85-1587

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DELORES AGEE, et al.,
Petitioners,

vs.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, HIRAM WALKER & SONS, INC., a corporation and DISTILLERY WORKERS OF AMERICA, LOCAL 55,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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THE QUESTIONS PRESENTED FOR REVIEW

I. Does this consent decree regarding sex discrimination, reached without approval or conference with its beneficiaries, defeat the purpose of Title VII of the Civil Rights Act of 1964?

II. Does this consent decree regarding sex discrimination offer insignificant settlement awards and pension relief based on arbitrary and capricious criteria set out by the payor and the Equal Opportunity Commission?

LIST OF PARTIES

A. Delores Agee, Madeline Aiello, Edna Braten, Laura Bury, Neva Buttell, Helen Claver, Charolette Dickerson, Leslie Drummer, Gladys Dwyer, Marty Esbell, Margaret Evans, Pearl Fice, Nora Flynn, Rose Genusa, Annie Gibbons, Freda Goldsmith, Agnes Hall, Rose Harvey, Louisa Harvey, Virgil Hayes, Doris Hornung,

Harriet Hutton, Clara Jenkens, Mary Kaufmann, Mary Lafferty, Clara Maricle, Eleanor Marinich, Amelia Monroe, Emma Lou Moore, Ruth Osborn, Ann Pitcher, Julia Ross, Lavon Schuster, Margaret Thompson, Millie Wageman, Josephine Walker, Ann Williams, Grace Wort, Jessie Wright and Geneva Wytcherly.

B. Equal Employment Opportunity Commission

C. Hiram Walker & Sons, Inc., a corporation

D. Distillery Workers & America, Local 55

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Constitution and Statutes:

If the court finds that the (employer) has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the (employer) from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. 42 U.S.C. 2000e-5(g), et seq.	2,4,10, 13,14

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REPORTS OF OPINIONS

AGEE, et al. v. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al., _____ F2d _____(1985).

JURISDICTIONAL STATEMENT

(i) The United States District Court for the Central District of Illinois in Peoria entered its order on January 26, 1984.

(ii) The United States Court of Appeals for the Seventh Circuit entered its order following appeal on July 24, 1985.

(iii) The United States Court of Appeals for the Seventh Circuit denied a Motion to Reconsider on October 8, 1985.

(iv) 28 U.S.C. §2101(c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, et seq.

28 U.S.C. §1291

28 U.S.C. §1294

STATMENT OF THE CASE

This Title VII litigation is based on four individual and/or group charges. (1) In 1975, 123 charges were filed by individual women against Hiram Walker & Sons, Inc. (2) In 1975, charges were filed against Hiram Walker & Sons, Inc., on behalf of certain female employees and retirees by the National Organization for Women. (3) Charges were filed as to certain female employees and retirees by Local 55 against Hiram Walker & Sons, Inc. (4) In 1977, 113 additional charges were filed against Hiram Walker & Sons, Inc. and Local 55.

The 1975 charges allege that the company discriminated against female employees because of their sex with regard to pension benefits. In 1977, charges were filed by 113 women against both the company and the union. The 1977 charges

allege that the company and the local union discriminated against female employees because of their sex with regard to job assignment and job exclusion, transfer and promotion, lay-off, and certain benefits.

The Equal Employment Opportunity Commission (EEOC) commenced an investigation of these charges and in 1978 issued an administratively restricted decision which found reasonable cause to believe that all allegations of sex discrimination were true. After conciliation efforts were unsuccessful, the Commission filed suit on September 27, 1979 in the Northern District of Illinois alleging that the company and the union violated Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C., Section 2000(e) et seq., in the company's facilities in Peoria, Illinois by intentionally engaging

in unlawful employment practices which discriminated against female employees because of their sex. In January of 1983, the District Court for the Northern District of Illinois granted Hiram Walker's Motion for Change of Venue to the District Court for the Central District of Illinois in Peoria, Illinois.

Agreement as to all terms was reached between the EEOC and Hiram Walker in September of 1983. No person affected under the proposal was conferred with nor contacted, until preliminary court approval was acquired, as to criteria for recovery established by Hiram Walker and the EEOC. The criteria for recovery was described in the Hiram Walker trial brief: "(A)ny female hired prior to 1960 who tried on at least one occasion to perform work somewhere other than in the Bottling Line Division would receive two years

additional credited service for pension purposes, and that any female hired between 1960 and 1965 who tried to perform work in another Seniority Division on at least one occasion would receive one additional year of credited service." The Petitioners allege such criteria to be clearly arbitrary and capricious in its design and effect. The Court gave preliminary approval of the proposed consent decree on September 23, 1983, and directed notice to charging parties and other affected individuals, and set a hearing for December 22, 1983. A large number of women, including those intervening now, filed objections to the proposed consent decree. At the hearing on December 22, 1983, the Court heard oral arguments in favor of the decree by both the EEOC and Hiram Walker attorneys, and objections to the decree by all interested

parties to this suit as well as counsel on appeal.

At the close of the hearing, the Court requested the attorneys to submit briefs regarding the effect of the entry of the consent decree upon the rights of charging parties and others to further litigate against the defendants. The Court approved the consent decree on January 26, 1984 and allowed charging and non-charging parties who had formally filed objections to intervene in this cause.

The case was appealed to the Seventh Circuit Court of Appeals absent the conventional transcripts made at trial. A public hearing of sorts was held on December 22, 1983, regarding the proposed consent decree. All issues raised and argued are contained in the record by way of briefs and memoranda. No testimony was taken by the trial court throughout the

life of this cause.

Accordingly, the trial court's statement of the facts at the introduction of its Memorandum Opinion and Order filed January 26, 1984 (and attached as a part of the appendix herein) should be taken as an accurate depiction of the complaints made by Petitioners.

The Seventh Circuit Court of Appeals affirmed the Trial Court's decree on July 24, 1985, and denied a Petition for Rehearing on October 8, 1985.

ARGUMENT

I.

THIS CONSENT DECREE REGARDING SEX DISCRIMINATION, REACHED WITHOUT APPROVAL OR CONFERENCE WITH ITS BENEFICIARIES, DEFEATS THE PURPOSE OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964.

On page 30 of the District Court's opinion and order filed January 26, 1984, the Court stated "(I)ronically, most of those women who were charging parties and endured (from their point of view) discriminatory effects for many years end up with no relief under the decree. On the other hand, women who started working at Hiram Walkers in the 1970s and were subject to discrimination, if at all, for far fewer number of years, obtained proportionally greater relief under the decree." It is clear from the result of the decree that its makeup was one which

thwarted and defeated the purpose of Title VII of the Civil Rights Act of 1964.

The purpose of Title VII is to put the discriminated plaintiff in a place he would have been but for the discrimination. The plaintiff is entitled to all benefits he would have gotten had there not been a discriminatory act. Civil Rights Act, 1964, Section 701 et seq. as amended 42 U.S.C. 2000e et seq. The United States Supreme Court has stated the object of Title VII to be the removal of barriers that have operated in the past to favor an identifiable group of employees over other employees. Griggs v. Duke Power Company, 401 U.S. 424, 429-30 (1971).

This consent decree defies the purpose and plan of Title VII in that its approval would close out from recovery those who suffered the most discrimination. The

decree clearly awards recovery to the younger females who worked at Hiram Walker in the 1970s, and ignores females employed there for incredibly longer periods. the motive is apparent: should the ones who suffered the most discrimination be allowed to recover based on the discrimination they endured, Hiram Walker's pay out cost would be enormously higher than presently planned.

Further, the consent decree sets out names of 253 women believed affected by the "negotiated" settlement, with 177 of the 253 identified as actual charging parties to the action. However, the entire amount of pension relief afforded female employees by the decree is an additional two (2) years credited service for only eight women. Eight other women received an additional one year credited service for purposes of determing monthly

pension benefits from Hiram Walker.

A mere 16 women, of 253 affected, acquired additional work service time under this decree. Unsurprisingly, not one of the 16 was awarded time enough to permit them to accrue the required 30 years of service in order to receive a huge boost in monthly pension pay plus full hospitalization and insurance benefits, although the one or two years service given the 16 brought several within only months of the magic 30 year full pension requirement.

The EEOC and Hiram Walker proponets of the decree argue that pension relief is a form of back pay liability, and that a two year limit applies to such relief. In support of their position they cite City of Los Angeles v. Manhart, 435 US 702 (1978). However, the Court in Manhart addresses a completely different issue

than that in the case at bar. In Manhart, the key issue was whether females were entitled to recover monies they had previously paid into a pension fund at a higher rate than males due to their expected higher life expectancy. The Court stated it did not wish to injure innocent third parties by, in effect, ordering a "rebate". By contrast to the instant case, however, the Court did not state nor imply that women, or anyone for that matter, cannot now recover something which they have already purchased.

Additionally, it is important to review the language of Section 706B(5)(g) of Title VII of the Civil Rights Act of 1964 42 U.S.C., Sec. 2000e-5(g), which states:

> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in

> such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay ...or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission." (emphasis added)

Logic alone dictates that it would be ludicrous to limit pension relief to only a previous two year period. Clearly it would be no remedy to permit the victims of an employment discrimination to recover a maximum of two years credit toward a pension when such an award would nearly always be of no value. Rather, it would be a far more legitimate and equitable remedy for the court to award years of credited service toward pension for the number of years during which a discrimination existed. The quoted statute by its terms does not limit the availability of

back pay but, rather, limits the extent to which the singular remedy may be afforded in making whole the victims of discrimination. When measured against the broad "make whole" purposes of Title VII, it becomes evident that the two year cap on back pay contained in 42 U.S.C. §2000e-5(g) is not a statute of limitations.

The petitioners in the instant cause aver that voluntary conciliation and settlement may be the preferred means for resolving disputed issues but that it is not the necessary nor appropriate means to resolve allegations of this employment discrimination. Settlement merely for the sake of settlement is contrary to the true intentions of Congress and contrary to the purpose of Title VII. It is inappropriate to believe the demerits of protracted litigation somehow outweigh the interests

of the discriminated women to recover a just award.

II.

THIS CONSENT DECREE REGARDING SEX DESCRIMINATION OFFERS INSIGNIFICANT SETTLEMENT AWARDS AND PENSION RELIEF BASED ON ARBITRARY AND CAPRICIOUS CRITERIA SET OUT BY THE PAYOR COMPANY AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION.

The criteria for recovery under the decree's terms was described in the Hiram Walker trial brief as being "any female hired prior to 1960 who tried on at least one occasion to perform work somewhere other than in the Bottling Line Division would receive two years additional credited service for pension purposes, and that any female hired between 1960 and 1965 who tried to perform work in another Seniority Division on at least one occasion would receive one additional year of credited service."

To permit such a self serving criteria

to stand as a basis for settlement of this issue would be to permit Hiram Walker to profit from its own wrong in that the company itself deliberately and actively discouraged its female employees from accepting involuntary transfers. Women who had accepted an involuntary transfer in the 1960s and found themselves unable to physically comply with the job's demands or found only embarrassment and humiliation by their physical failures in the presence of jeering males were clearly discouraged from ever attempting to handle involuntary transfers in the future. Such a practice was not a consideration in establishing consent decree criteria even though it is well settled law that a primary purpose of Title VII award is to again make a person "whole" for injuries caused by illegal employment discrimination.

The consent decree provides stated payments to 82 named former Hiram Walker female employees, the total of these payments to be $165,600. The women selected to receive the lump sum payments were, according to the company, females who were initially assigned to the Bottling Line Seniority Division and who demonstrated by their use of transfers to other seniority divisions during the period 1975-81 that they might have both accepted an initial assignment to a seniority division other than the Bottling Line Division and successfully performed the work in another division. Each eligible employee "was given a certain amount for each year of eligibility," again according to the company. However, those women discouraged from involuntary transfers prior to 1975-81's "pertinent period" take nothing under the proposed decree although they

have clearly suffered the most discrimination the longest.

Furthermore, the facts reveal that it was understood among employees that failure to perform the involuntary transfer job could result in not just lay-off but dismissal. It is a grim notion to believe that the aforementioned criteria, established long after the proverbial game had been played, is anything but arbitrary. It should be clear to even the most ardent Hiram Walker supporter that the effect of the pension relief was calculated first, with the criteria for such relief to come much later. In short, the goal was to permit no one to recover their deserved 30 years of service not give anyone more than a token few more monthly dollars toward pension pay.

The Petitioners submit that Hiram Walker and the Equal Employment Opportunity

Commission had established a destiny for pension relief which under no circumstances would be significantly favorable to female company employees, regardless of equitability.

Criteria or no criteria, it cannot be disputed that many women who were in the same, or similar, positions as those included in the consent decree are simply left out. While examples are many, employees Ann Williams and Londia Wyatt typify a sample of the arbitrariness of the decree's criteria. Both women accepted transfers to the "rack house" for a period of four weeks in 1977. After that period Ann Williams refused to be subjected to the rack house work, which was recognized as physically troubling and dangerous for females. Londia Wyatt accepted two more short stints at the rack house. Under the decree, Ann Williams

receives nothing and Londia Wyatt receives $4,500.00.

In the case at bar, the largest recovery made by any female under the decree (and presumably the most deserving under the Hiram Walker/EEOC Criteria) is approximately $5,000. The total cost to Hiram Walker under this decree affecting in excess of 200 women for more than a generation is $200,000. Such a sum falls far short of reasonable compensatory amounts under the facts of this cause of action.

The Equal Employment Opportunity Commission states that "each (party) give(s) up something they might have won had they proceeded with the litigation." However, it is wrong to believe that compromise at any cost is victory. The injustice that would result from the arbitrary and subjective consent decree

will only encourage similar practices by companies in the future. No possible reason would exist for a corporate entity the size of Hiram Walker & Sons, Inc. to conform to the rigors of fair employment practices when discrimination as in the instant case is remedial by this sort of arbitrary remedy.

The Seventh Circuit Court of Appeals noted on pages nine and ten of its order that a District Court should be chary of disapproving a consent decree, and an appellate courts review of a decree is even more limited. We believe, however, that this Court of last resort is not so limited and may review a consent decree as it conforms, or does not conform, to constitutionally and statutorily protected rights and assurances.

Surely the female employees affected by the proposed consent decree deserve not

only a disposition free from arbitrary criteria that can be sensibly understood. The proposed decree must be rejected and returned to the District Court.

CONCLUSION

The Petitioners respectfully pray of this Honorable Court to reverse the order of the Seventh Circuit Court of Appeals and the District Court in approving the proposed consent decree and remand the cause for trial on the merits.

Respectfully submitted,

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85-1587

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PETITIONER APPENDIX

AGEE, et al. v. EEOC, et al.

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In the

United States Court of Appeals

For the Seventh Circuit

No. 84-1588

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Plaintiff-Appellee,

and

DELORES AGEE, MADELINE AIELLO, EDNA BRATEN, LAURA BURY, NEVA BUTTELL, HELEN CLAVER, CHAROLETTE DICKERSON, LESLIE DRUMMER, GLADYS DWYER, MARY EBELL, MARGARET EVANS, PEARL FICE, NORA FLYNN, ROSE GENUSA, ANNIE GIBBONS, FREDA GOLDSMITH, AGNES HALL, ROSE HARVEY, VIRGIL HAYES, DORIS HORNUNG, HARRIET HUTTON, CLARA JENKENS, MARY KAUFMANN, MARY LAFFERTY, CLARA MARICLE, ELEANOR MARINICH, AMELIA MONROE, EMMA LOU MOORE, RUTH OSBORN, ANN PITCHER, JULIA ROSS, LAVON SCHUSTER, MARGARET THOMPSON, MILLIE WAGEMAN, JOSEPHINE WALKER, ANN WILLIAMS, GRACE WORT, JESSIE WRIGHT, and GENEVA WYTCHERLY,
Intervenors-Appellants,

v.

HIRAM WALKER & SONS, INC., and DISTILLERY WORKERS OF AMERICA, LOCAL 55,
Defendants-Appellees.

Appeal from the United States District Court for the
Central District of Illinois, Peoria Division.
No. 83-1024, **Michael M. Mihm**, *Judge.*

ARGUED FEBRUARY 14, 1985—DECIDED JULY 24, 1985

Before WOOD and FLAUM, *Circuit Judges*, and PELL, *Senior Circuit Judge.*

PELL, *Senior Circuit Judge.* Appellants, thirty-nine former employees of Hiram Walker & Sons, Inc. (Walker or the company), appeal from a consent decree entered in settlement of a sex discrimination in employment suit brought by the Equal Employment Opportunity Commission (EEOC) against the company. The district court permitted appellants to intervene for purposes of appeal. The issue on appeal is whether the district court abused its discretion when it approved the decree, which grants limited relief to the class of employees as a whole and virtually no relief to those employees, many of them charging parties, who allegedly endured the most discrimination.

I. THE FACTS

Two sets of charges gave rise to the present litigation. In 1975, 123 female employees filed charges against Walker, the National Organization of Women filed a charge on behalf of certain current and retired female employees, and the employees' union, Local 55 of the Distillery Workers of America, filed similar charges. All 1975 charges related to alleged discrimination in the provision of pension benefits and sought, as remedies, the recalculation of those benefits. In 1977, 113 female employees filed charges against both Walker and Local 55 alleging discrimination in job assignment and exclusion, transfer and promotions, layoffs, and provision of certain benefits. The 1977 charges requested back pay relief in addition to other remedies.

An EEOC investigation found reasonable cause to believe that all the allegations were true and, after conciliation attempts failed, the EEOC brought suit against both the company and the union under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e (1976). The complaint alleged that defendants engaged in a variety of unlawful employment practices that discriminated against women employees because of their sex. Defendants denied all allegations and asserted numerous affirmative defenses to the charges. Settlement negotia-

tions occurred over a period of several years and, by the time the parties agreed to the consent decree in 1983, they had completed practically all relevant discovery. The district court granted preliminary approval of the proposed consent decree and directed that the parties send notice to the affected individuals. At the subsequent fairness hearing in late 1983, the court heard arguments against approval from numerous objectors, some appearing *pro se* and some represented by counsel, and arguments in support of the decree from both the EEOC and Walker. In a comprehensive, thirty-six page memorandum opinion and order, the district court approved the final consent decree. The court then allowed those employees who had objected to the decree to intervene for purposes of appeal.

The EEOC and Walker present dramatically different interpretations of the facts underlying the allegedly discriminatory practices. The undisputed facts are that Walker divided its Peoria, Illinois, plant, since closed by Walker in 1981, into ten divisions, with a total work crew of between 479 and 889 employees. In the 1981 shutdown agreement between the company and Local 55, each employee who, because of a layoff, had received less than a full year's pension credit for any year between 1973 and 1981 had pension benefits redetermined as if the employee had worked the entire year.

According to the EEOC, prior to 1965, Walker classified all jobs as either "men's jobs" or "women's jobs." Then, after passage of Title VII, the new collective bargaining agreement split one of the plant divisions in two, thus creating a new division that encompassed all those jobs formerly designated as women's jobs, the lowest paying positions in the plant. The women employees, largely confined to production aspects of the plant's activities, were most directly affected by fluctuations in output, rendering them highly susceptible to layoff. When layoffs occurred, an employee had the option of taking an "involuntary transfer" to another position, but both the company and the union encouraged women employees to

sign a written "decline of transfer" form, revocable only in writing. The company generally considered women to be incapable of performing men's jobs, and, if a woman chose to take an involuntary transfer, the company invariably assigned her to a physically difficult job, thereby discouraging further transfers. The frequent layoffs had a substantial detrimental effect upon the pension benefits earned by female employees, because benefits were based upon both years of service and salary. Not until 1973 did Walker make initial assignments of women to jobs other than the traditionally women's jobs; in 1975, the company ceased using the written decline of transfer forms; and, by 1977, the company had hired a significant number of women into traditional men's jobs.

During the course of discovery and settlement negotiations, it became apparent that the EEOC and Walker had fundamental disagreements about numerous legal issues. One disputed issue was whether the 1975 pension-related charges or the more expansive 1977 charges triggered the right to back pay. The importance of that issue rests in the fact that Title VII imposes a two-year statute of limitations upon the recovery of back pay. 42 U.S.C. § 2000e-5(g). A closely related issue was whether the pension relief sought pursuant to the 1975 charges was in the nature of back pay relief, as the company contended, or, as the EEOC maintained, injunctive relief, for which there is no statute of limitations. Thirdly, Walker claimed that only its initial assignments of women employees were subject to judicial review. Because Illinois has an applicable statute, any claimant had to file an EEOC charge within 300 days of the alleged discrimination, and Walker's interpretation would thus greatly limit the number of women who could receive monetary relief. 42 U.S.C. § 2000e-5(3). The EEOC, on the other hand, maintained that Walker had engaged in a continuing violation of Title VII, consequently tolling the 300-day limit. Finally, the company also argued that the EEOC could not establish that pension relief was available for any period before 1973, the EEOC having conceded that the shutdown agreement granted all pension benefits potentially ob-

tainable through litigation from 1973 until the plant closed. The company maintained that the individual employees caused all adverse effects upon their pension benefits by declining to exercise their right to an involuntary transfer, as opposed to layoff.

The proposed consent decree, approved by the district court over the objections of appellants, provided two basic types of relief. The settlement limited pension relief to those women hired prior to 1965 who had demonstrated some willingness to take a men's job after 1965. Apparently, the time limit was a result of the elimination of explicit male and female job classifications beginning with the 1965 collective bargaining agreement, and the requirement of a demonstrable willingness to take a men's job limited relief to those who clearly suffered as a result of the alleged discrimination. Using these criteria, eight women hired before 1960 received two additional years of credited service for purposes of determining their pension benefits, and eight women hired between 1960 and 1965 received one additional year of service.

The monetary relief, called "Initial Assignment Relief" by the parties, awarded $151,200, divided in amounts ranging from $900 to $5,850, to fifty-eight women hired before 1977 and $14,400, in amounts ranging from $225 to $900, to twenty-four women hired in 1977 or 1978. Only women who, beginning in 1973—the earliest possible cutoff date if the two-year statute of limitations for back pay applied—took involuntary transfers instead of layoffs were eligible for initial assignment relief. Finally, all charging parties who received no specific relief under the decree would share in any awarded sums that were not disbursed because of the death of or inability to locate the designated recipient.

The objections to the proposed decree took a wide variety of forms, although there were three principal objections. The most prevalent objection below, and the one most strenuously urged on appeal, was that those women who suffered the most effects from Walker's dis-

crimination for the longest period received little or no relief. Indeed, of the 123 women who filed 1975 charges with respect to pension benefits, only sixteen received relief, and none of the longest-employed women received initial assignment relief. A second objection, related to pension benefits, compared the level of the objectors' newly adjusted benefits to the benefits received by men hired contemporaneously with the objectors. The parties do not dispute that the achievement of a thirtieth year of credited service resulted in a huge jump in the level of pension benefits received—from approximately $160 per month and no medical benefits to $700 per month and full medical coverage—and that the pension relief afforded by the decree placed none of the recipients over the thirty-year threshold. As a result, the pension relief amounted to less than twenty dollars per month for each of the sixteen recipients. Finally, the objectors claimed that the decree failed to address the discriminatory effects resulting from the company's discouraging them from taking transfers. In other words, because the company historically had actively discouraged involuntary transfers and continued to do so until the plant closed, many female employees could never fulfill the willingness criterion for initial assignment relief.

The district court, applying the test set out in *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 616 F.2d 1006 (7th Cir. 1980), determined that the proposed decree was "fair, adequate, reasonable and appropriate under the particular facts," *id.* at 1014, and, consequently, approved the decree. The court noted that, if it denied approval, the case might continue for years and any trial could take at least four months. The court went on to note the bitterness felt by Walker's long-term employees and acknowledged that they might be correct in believing the settlement to be inadequate. Indeed, in allowing most of those employees to intervene for purposes of this appeal, the court stated:

> Ironically, most of those women who were charging parties and endured (from their point of view)

> discriminatory effects for many years end up with no relief under the decree. On the other hand, women who started working at Hiram Walker in the 1970's and were subject to discrimination, if at all, for a far fewer number of years, obtain proportionately greater relief under the decree.

Nonetheless, the court noted:

> If any one or more of the hotly contested issues were decided in favor of Hiram Walker, the end result could be no relief at all, or at least less relief than is contained in the Consent Decree. The Court is not convinced that the legal issues involved are well settled in favor of the EEOC position. I perceive that there is an inherent risk to all parties if this case were to go to trial.

In light of the risks of litigation, the court determined that the relief provided by the decree was fair and reasonable.

On appeal, the intervenors reassert all the same grounds that they raised below as objectors to attempt to show that the decree is not fair and reasonable, specifically because most of those who suffered from discrimination for the longest period of time received little or no relief.

II. THE DECISION

The standard of review applicable to our review of the district court's approval of the consent decree is a narrow one, largely because of the nature of the district court's function when considering approval. The same standards generally apply to district and appellate court review of Title VII settlements as apply to any class action settlement. *Airline Stewards & Stewardesses Association, Local 550 v. American Airlines, Inc.*, 573 F.2d 960, 963 (7th Cir. 1978) (per curiam), *cert. denied*, 439 U.S. 876. Underlying

these standards is the general policy favoring voluntary settlements of class action disputes, *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 616 F.2d at 1013; *accord Bennett v. Behring Corp.*, 737 F.2d 982, 986 (11th Cir. 1984); *Adams Extract Co. v. Pleasure Hours, Inc. (In re Corrugated Container Antitrust Litigation)*, 643 F.2d 195, 207 (5th Cir. 1981), *cert. denied*, 456 U.S. 998 (1982), a policy even more forcefully applicable in Title VII cases because of Congress' express preference for settlement in such cases, *Freedman v. Air Line Stewards & Stewardesses Association, Local 550*, 730 F.2d 509, 515 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 275; *Air Lines Stewards & Stewardesses Association, Local 550 v. American Airlines, Inc.*, 455 F.2d 101, 109 (7th Cir. 1972); *accord Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982), *cert. denied*, 459 U.S. 828; *Moore v. City of San Jose*, 615 F.2d 1265, 1271 (9th Cir. 1980); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1183 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979).

As we have recognized repeatedly, a district court must determine whether a proposed decree is lawful, fair, reasonable, and adequate. *Gautreaux v. Pierce*, 690 F.2d 616, 631 (7th Cir. 1982); *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 616 F.2d at 1024. *Accord Kirkland v. New York State Department of Correctional Services*, 711 F.2d 1117, 1129 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 997 (1984). Among the factors that a district court should consider when it makes this "fairness" determination are: a comparison of the strengths of plaintiffs' case versus the amount of the settlement offer; the likely complexity, length, and expense of the litigation; the amount of opposition to the settlement among affected parties; the opinion of competent counsel; and, the stage of the proceedings and the amount of discovery already undertaken at the time of the settlement. *Gautreaux v. Pierce*, 690 F.2d at 631, *citing Armstrong v. Board of School Directors*, 616 F.2d 305, 314 (7th Cir. 1980). The first-listed factor is the most important. *Armstrong v. Board of School Directors*, 616 F.2d at 314. *Accord Walsh v. Great Atlantic & Pacific Tea Co.*, 726 F.2d 956, 965 (3d Cir.

1983); *Williams v. Vukovich*, 720 F.2d 909, 922 (6th Cir. 1983); *Flinn v. FMC Corp.*, 528 F.2d 1169, 1172 (4th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976). The district court may not deny approval of a consent decree unless it is unfair, unreasonable, or inadequate.

The district court should refrain from resolving the merits of the controversy or making a precise determination of the parties' respective legal rights. *Dawson v. Pastrick*, 600 F.2d 70, 75 (7th Cir. 1979); *Bryan v. Pittsburgh Plate Glass Co. (PPG Industries, Inc.)*, 494 F.2d 799, 801 (3d Cir. 1974), *cert. denied*, 419 U.S. 900. The essence of settlement is compromise. *Gauteaux v. Pierce*, 690 F.2d at 637. *Accord Officers for Justice v. Civil Service Commission*, 688 F.2d 613, 624 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983); *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977). Each side gains the benefit of immediate resolution of the litigation and some measure of vindication for its position while foregoing the opportunity to achieve an unmitigated victory. *United States v. Armour & Co.*, 402 U.S. 673, 681 (1971); *McDonald v. Chicago Milwaukee Corp.*, 565 F.2d 416, 429 (7th Cir. 1977); *United States v. City of Jackson, Mississippi*, 519 F.2d 1147, 1152 (5th Cir. 1975). Thus, the parties to a settlement will not be heard to complain that the relief afforded is substantially less than what they would have received from a successful resolution *after* trial. *Freedman v. Air Line Stewards & Stewardesses Association, Local 550*, 730 F.2d at 514-15 ("The chances of the outcome of litigation ... represented precisely the calculated risks which both parties took in deciding to terminate the suit through settlement."); *Air Lines Stewards & Stewardesses Association, Local 550 v. American Airlines, Inc.*, 455 F.2d at 109 ("This is precisely the sort of gratuitous opinion that the parties are entitled not to have foisted upon them under the scheme of Title VII."). That each side gains something is, of course, true of all settlements between rational parties and is not alone sufficient to approve the settlement.

While a district court should be chary of disapproving a consent decree, an appellate court's review of a decree is

even more limited. *Armstrong v. Board of School Directors*, 616 F.2d at 315; *Dawson v. Pastrick*, 600 F.2d at 75. The equitable and subjective nature of the district court's inquiry has led the appellate courts to apply an abuse of discretion standard of review to a district court's determination that a consent decree is fair. *Dawson v. Pastrick*, 600 F.2d at 75; *Airline Stewards & Stewardesses Association, Local 550 v. American Airlines, Inc.*, 573 F.2d at 962; *Patterson v. Stovall*, 528 F.2d 108, 112 (7th Cir. 1976). *Accord Flinn v. FMC Corp.*, 528 F.2d at 1172; *Bryan v. Pit'sburgh Plate Glass Co. (PPG Industries, Inc.)*, 494 F.2d at 801. *Cf. Donovan v. Robbins*, 752 F.2d 1170, 1177 (7th Cir. 1985) (reversing district court's *refusal* to approve consent decree and suggesting, although ultimately rejecting, that a less deferential standard of review might apply to such cases); *United States v. City of Alexandria*, 614 F.2d 1358, 1362 (5th Cir. 1980) (applying *de novo* review to appeal from district court's refusal to approve decree). Yet, the fact that the district court's exercise of discretion is equitable in nature does not insulate the settlement from review. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975). Our review must focus upon the district court's application of the principles governing approval of consent decrees and not upon the substantive legal issues. *Armstrong v. Board of School Directors*, 616 F.2d at 315.

Applying this abuse of discretion standard to the present case, we note that the district court gave careful consideration to the claims raised below by appellants and denied them relief only after a comprehensive, thirty-six page opinion. The court specifically addressed all the appropriate factors delineated in *Gautreaux*. The court properly focused its analysis on a comparison of the settlement benefits—acknowledged to be not overly generous, especially with respect to those women employed the longest—with the likely outcome of litigation. The court noted the great uncertainty about the proper resolution of a number of legal issues involved, any one of which, if resolved in favor of Walker, would result in no recovery for any of the affected women, even those who received

benefits under the decree. While the number of objectors clearly concerned the district court, nevertheless, the court concluded that, on balance, the substantial risks of litigation and the time and expense that a long trial would require justified the settlement. We conclude that the district court did not abuse its discretion by approving the consent decree in this case.

Except for the number of objectors, none of the factors that have caused appellate courts to view certain consent decrees with scepticism is present in this case. Those suspicious factors include the allocation of most or all of the settlement benefits to the named plaintiffs or, in cases like this, the charging parties, *see Holmes v. Continental Can Co.*, 706 F.2d 1144, 1147 (11th Cir. 1983); *United States v. Texas Education Agency*, 679 F.2d 1104, 1107 (5th Cir. 1982) (per curiam); *Plummer v. Chemical Bank*, 668 F.2d 654 (2d Cir. 1982), the filing of a proposed decree early in the history of a case, before significant discovery has occurred, *see Oswald v. General Motors Corp. (In re General Motors Corp. Engine Interchange Litigation)*, 594 F.2d 1106, 1128 (7th Cir. 1979), *cert. denied*, 444 U.S. 870; *accord Malchman v. Davis*, 706 F.2d 426, 434 (2d Cir. 1983); *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456, 463 (2d Cir. 1982); *Plummer v. Chemical Bank*, 668 F.2d 654, or, an allegation that the attorneys involved have sacrificed their clients' interests to assure themselves of receiving sizable attorneys' fees, *Oswald v. General Motors Corp. (In re General Motors Corp. Engine Interchange Litigation)*, 594 F.2d at 1130; *Patterson v. Stovall*, 528 F.2d at 113; *accord Ficalora v. Lockheed California Co.*, 751 F.2d 995, 996-97 (9th Cir. 1985). In the present case, most of the settlement funds went to employees other than the principal charging parties, *see Parker v. Anderson*, 667 F.2d 1204 (5th Cir. 1982), the settlement occurred only after extensive discovery, *see Flinn v. FMC Corp.*, 528 F.2d at 1172 (settlement at late stage of discovery assures sufficient development of record to permit reasonable assessment of merits), and, each party agreed to bear its own costs. Nor is there any suggestion in the record, aside from some objectors' totally unsubstantiated assertions,

that the parties entered the decree merely to rid themselves of lengthy litigation. *See Armstrong v. Board of School Directors*, 616 F.2d at 327. Consequently, aside from the number of objectors, nothing in the record suggests that heightened appellate review would be appropriate in this case. *See United States v. City of Alexandria*, 614 F.2d at 1361 (suggesting that level of scrutiny varies with factors such as the trial court's familiarity with the issues, the stage of discovery, and the types of issues involved).

As we have previously stated, in a class action case brought under 42 U.S.C. § 1983:

> The district court analyzed the relief offered in the settlement at length and found that, when balanced against the uncertain status of the law as to plaintiffs' claims and the probable complexity of any further litigation, it provided relief which was fair, reasonable and adequate. . . . The district court's analysis indicated to it that the settlement provides the plaintiff class with substantial relief from the [illegal] acts of the defendants while securing for the litigants the benefits of a prompt resolution of the suit without further litigation. We cannot say that the district court abused its discretion in finding that the balance of these factors favored settlement.

Armstrong v. Board of School Directors, 616 F.2d at 323. *Accord Officers for Justice v. Civil Service Commission*, 688 F.2d at 625. We reach a similar conclusion here, for much the same reasons. There is no showing that the amounts received by the beneficiaries of the settlement were totally inadequate. *United States v. Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826, 864 (5th Cir. 1975) (settlement upheld; no "compelling showing" that average of $500 award was "nothing but a mere pittance"), *cert. denied*, 425 U.S. 944 (1976); *Bryan v. Pittsburgh Plate Glass Co. (PPG Industries, Inc.)*, 494 F.2d at 802 (given likelihood that plaintiffs would receive nothing if case went to trial, no abuse of discretion in approval of settlement for small percentage of plaintiffs' asserted loss). *See also City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 n.2 (2d Cir.

1974) (dictum) (antitrust case). Similarly, none of the women excluded from relief by the decree has established that she should have been included. As we have noted, there was a substantial risk that no employees would have received any relief had the case gone to trial. Thus, the fact that a substantial number of the affected women received significant relief, when considered in light of the expense and great risks of further litigation, leads us to conclude that the district court did not abuse its discretion.

The fact that a large number of women objected does not alter our conclusion. Thirty-nine women—out of 253 affected by the settlement—appealed from the district court's judgment approving the decree. Thus, the objectors number less than fifteen percent of the affected women. The only case of which we are aware in which the number of objectors was the key factor in reversing approval of a decree is *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979). In that case, approximately seventy percent of the relevant subclass objected to a back pay settlement. The court acknowledged that district courts could approve a decree despite a large number of objectors, *id.* at 1215, 1217, but, under the circumstances, concluded that the number of objectors indicated that there was something unfair about the decree, *id.* at 1216, 1218. In opposition to *Pettway* stand *Reed v. General Motors Corp.*, 703 F.2d 170 (5th Cir. 1983), and *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456 (2d Cir. 1982), in which forty percent and fifty-five percent, respectively, of the affected claimants objected, but the courts still affirmed the district courts' approval of the decrees. These cases established that, without more, a large number of objectors will not result in the reversal of a district court's approval of a consent decree. As we have demonstrated above, no other factor is present in this case to suggest that the settlement is suspect, either in amount or in the procedural manner in which the parties reached, and the district court approved of, the settlement.

Although appellants' counsel at oral argument claimed, in passing, that the decree intentionally discriminated against those who brought charges against Walker, appellants failed to include this allegation of vindictiveness in either the initial or the reply brief. Furthermore, there is nothing in the record to substantiate counsel's assertion. Also, appellants evidently did not raise the vindictiveness claim below. Consequently, this case is clearly distinguishable from *Ficarola v. Lockheed California Co.*, 751 F.2d 995 (9th Cir. 1985), where the appellant alleged vindictiveness in the district court, but the district judge made no inquiry into the allegation. In the present case, because appellants never raised, in the district court, the issue of retaliatory exclusion from the consent decree's benefits, they cannot raise it for the first time on appeal. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); *Yorger v. Pittsburgh Corning Corp.*, 733 F.2d 1215, 1220 (7th Cir. 1984).

Finally, appellants seek a favorable ruling from this court by appealing to the acknowledged remedial goal of Title VII to make whole the victims of sex discrimination. *Albermarle Paper Co. v. Moody*, 422 U.S. at 418; *Freedman v. Air Line Stewards & Stewardesses Association, Local 550*, 730 F.2d at 513. The problem with appellants' argument is that the principle that they cite applies only after there has been a judicial determination or a concession of liability. There can be no court-imposed remedy without a finding of liability. In the present case, there has been no such finding. The parties reached a settlement without a concession of liability by defendants and with the substantial possibility that trial would entirely absolve defendants. As one court has stated in a similar situation, the duty of a district court to make whole a victim of discrimination "arises only after a judicial determination of discrimination. A court asked to approve a compensation procedure established pursuant to a consent decree in which discrimination is neither admitted nor proven is in a fundamentally different position." *United States v. Trucking Employers, Inc.*, 561 F.2d 313, 317 n.13 (D.C. Cir. 1977).

III. CONCLUSION

We have considered all the arguments of appellants and find them to be without merit. Having concluded that the district court did not abuse its discretion in approving the consent decree, we AFFIRM the judgment.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

USCA 50234—Pandick Midwest, Inc., Chicago—7-24-85—450

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

October 8, 1985

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. WILBUR F. PELL, JR., Senior Circuit Judge

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Appellee,	
NO. 84-1588 VS.	Appeal from the United States District Court for the Central District of Illinois, Peoria Division.
DELORES AGEE, et al., Intervenors-Appellants,	
vs.	No. 83-1024
HIRAM WALKER & SONS, INC. and DISTILLERY WORKERS OF AMERICA, LOCAL 55, Defendants-Appellees.	Michael M. Mihm, Judge

On consideration of the petition for rehearing filed in the above-entitled cause by plaintiff-appellants, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	
v.	)	No. 83-1024
HIRAM WALKER AND SONS, INC., and DISTILLERY WORKERS OF AMERICA, LOCAL 55,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

On September 23, 1983, this Court preliminarily approved a Consent Decree upon to resolve this case by Plaintiff, Equal Employment Opportunity Commission ("EEOC" or "Commission"), and Defendants, Hiram Walker and Sons, ("Hiram Walker" or "the Company") and Distillery Workers of America, Local 55 ("Local 55" or "the Union"). After a thorough consideration of the issues involved in this case, the

Court approves this Consent Decree as fair, reasonable, and adequate resolution of this litigation.

This litigation is based on four individual and/or group charges. In 1975, 123 charges were filed by individual women against Hiram Walker; a charge was filed against Hiram Walker on behalf of certain female employees and retirees by the National Organization for Women; and charges were filed as to certain female employees and retirees by Local 55 against Hiram Walker. The 1975 charges alleged that the Company discriminated against female employees because of their sex with regard to pension benefits. In 1977 charges were filed by 113 women against both the Company and the Union. The 1977 charges alleged that the Company and Union discriminated against female employees because of their sex

with regard to job assignment and job exclusion, transfer and promotion, layoff, and certain benefits.

The EEOC commenced an investigation of these charges and in 1978 issued an Administratively Restricted Decision which found reasonable cause to believe that all allegations of sex discrimination were true. After conciliation efforts were unsuccessful, the Commission filed suit on September 27, 1979 in the Northern District of Illinois alleging that the Company and the Union violated Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), 42 U.S.C. §2000e, et seq., in the Company's facilities in Peoria, Illinois, by intentionally engaging in unlawful employment practices which discriminated against female employees because of their sex. The allegations as to the Company

included, but were not limited to, illegal practices regarding job assignment, promotion, transfer, layoff, and benefits, as well as entering into collective bargaining agreements designed to generate and continue such discriminatory practices. The allegations as to the Union included entering into collective bargaining agreements designed to generate and continue discrimination against women in job assignment, promotion, transfer, layoff and benefits. All violations were alleged to have occurred from at least July 2, 1965, continuously to the date of filing.

Hiram Walker and Local 55 denied these allegations and asserted numerous affirmative defenses, including the 300 day statute of limitations, the fact that any adverse effect of the seniority system on female employees necessarily

was the result of voluntary actions by each individual employee, the two year statutory limit on any back pay relief, and other defenses. Hiram Walker and Local 55 each filed cross claims against each other and answers to their respective cross claims. In January, 1983, the District Court for the Northern District of Illinois granted Hiram Walker's motion for change of venue to this Court.

At the time the parties reached settlement, all discovery was essentially complete with the exception of testimony of statistical and actuarial experts on both sides. Settlement discussions lasted several years and involved the assistance of a United States Magistrate. Final agreement as to all terms was reached in September of 1983. Concomitant with its preliminary approval

of the proposed Consent Decree on September 23, 1983, this Court directed notice to charging parties and other affected individuals, and set a hearing for December 22, 1983. Notice by publication was used for parties who could not be reached by mail. Many women filed objections to the proposed Consent Decree. At the hearing on December 22, 1983, the Court heard oral arguments in favor of the Decree by both EEOC and Hiram Walker attorneys, and objections to the Decree by attorneys representing objectors and by objectors proceeding pro se. At the close of the hearing, the Court requested the attorneys to submit briefs regarding the effect of the entry of the Consent Decree upon the rights of charging parties and others to litigate further against the Defendants. The Court set a hearing date of January 26, 1984, to

announce its decision on the proposed Consent Decree.

BACKGROUND

Hiram Walker's plant in Peoria produced various alcoholic beverages. The plant was structured into ten divisions, with 22 departments within these divisions. Local 55 represented most of the employees at the Peoria plant. Depending on the season, the plant employed between 479 and 889 persons. The plant was closed by Hiram Walker in the fall of 1981 and Local 55 is now essentially defunct due to lack of membership.

The facts leading up to the filing of this suit are subject to different interpretations by the EEOC and the Company.

EEOC Position

According to the EEOC, women were

historically assigned to jobs on the bottling line, which was part of the Bottling Division. There were jobs recognized as "men's jobs" and "women's jobs". These jobs were identified by sex in the collective bargaining agreement prior to 1965. Because "women's jobs" were directly tied to levels of production, they were more immediately and extensively affected by any changes in production and were thus more frequently and extensively subject to layoff. The women's job categories were also the lowest paying jobs. In 1965, the Company and the Union, paying lip service to the recently enacted Civil Rights Act of 1964, modified the collective bargaining agreement to delete references to jobs being "male" and "female". The Bottling Division, the only division containing substantial numbers of female employees, was split into two

divisions: the "women's jobs" becoming the Bottling Line Division and the "men's jobs" becoming the Bottling Services Division. This had the effect, to a large extent, of negating the single seniority list for all employees that was also created at this time (i.e., by splitting the Bottling Division into two divisions, the Union and the Company simply replaced the explicit contractual segregation of the women into specific job categories by building new division walls).

The EEOC states that the Company and Union in 1965 also amended the collective bargaining agreement to allow employees who did not want to be considered during a reduction-in-force for an involuntary transfer to jobs in another division to advise the Company in writing by filling out a form to be provided by the Company. The employee could revoke this "decline

of transfer" form only by doing so in writing. In practice, women were considered able and qualified for only women's jobs and thus did not transfer. Both the Company and Union officials encouraged women to sign the decline of transfer form. Women were told that they would probably be given the heaviest work in the entire plant, rolling barrels, if they accepted an involuntary transfer. Most of the few women who did accept involuntary transfers were assigned to rolling barrels and were ridiculed by male employees who refused to assist them on tasks normally involving two employees. Thus, many who attempted to avoid layoff by accepting involuntary transfer were discouraged from attempting to do so again. The unpleasant experiences of these women were widely known by female employees, many of whom saw this as evi-

dence that women who tried to buck the existing system would be placed in similarly impossible situations. Furthermore, some women who inquired about transfers in the late 1960's and early 1970's were told that they had to pass a physical examination in order to qualify and that they failed to meet the minimum height and weight requirements.

In 1973, Hiram Walker for the first time hired and initially assigned a few women to what had previously been "men's jobs". Generally, new female employees were no longer asked to sign the decline of involuntary transfer forms. In 1975, Hiram Walker ceased using the decline of transfer forms, the EEOC asserts, although posting of position openings remained segregated by traditional sex roles in that openings for traditionally male jobs were posted only in those areas of the

plant where males traditionally worked. By 1977, a more significant number of women were hired directly into traditionally male jobs, yet at no time in EEOC's estimation did such assignments reach a level which would be expected if assignment had been made free of sex bias.

With regard to pension benefits, the EEOC states that prior to 1969, Hiram Walker provided a voluntary pension plan wherein benefits were based on an employee's years of credited service and salary. To receive a year of credited service, an employee had to work or be compensated for 2,080 hours within a given calendar year, with proportional credit being given for less than that amount. Women, because of the nature of the jobs for which they deemed eligible, were much more subject to layoff than males. Hence, within a calendar year,

they typically gained much less credited service than males having comparable plant seniority. In 1969 and 1972, the Company and Union renegotiated pension benefits. The requisite hours for a year of credited service were lowered and these changes were made retroactive so that an employee's credited service for all prior years was computed anew. Each of these revisions weakened but did not essentially alter the adverse effect on women created by the Company's policies.

The shut-down agreement between the Union and the Company provided in part that each employee represented by the Union who, as a result of layoff, received less than one full year of credited service for pension purposes for any year from 1973 to shut0down, would for such year receive a full year of credited service. Thus, the credited service of each

employee during this period was again redetermined.

Hiram Walker Position

In its brief in support of the Consent Decree, Hiram Walker argues that discrimination practiced by the Company up until the mid-1960's was perfectly legal and reflected societal standards. Each sex had its own work. From 1966 onward, whenever a female was about to be laid off, Hiram Walker offered her a chance to use her plant seniority to work in other divisions and thereby avoid lay-off. Hiram Walker goes on to argue that:

> "However, although there is absolutely no doubt that these opportunities were available, because certain female employees fully utilized their new rights, during the balance of the 1960's, most female employees declined to transfer to other Divisions, instead choosing a voluntary layoff, the Bottling Line Division when

> bottling work again increased." (Hiram Walker's Brief in Support of Consent Decree, p. 21).

Throughout the 1970's more and more female employees elected to work in other divisions to avoid layoff and by the mid-1970's, such actions were commonplace. Each employee, male or female, worked where he or she desired and elected either voluntary layoff or continued work.

In the 1975 negotiations between Hiram Walker and Local 55, certain female employees became "agitated" about the fact that they had less pension-credited service than male employees with similar plant seniority dates. This circumstance was due to the pre-1966 layoffs of the bottling line employees, the closing of Hiram Walker's Clarke Street plant and its impact on certain female employees, and the fact that, rather than exercising

their plant seniority rights to work in another division to avoid layoff after 1966, many female employees from the bottling line division elected to take voluntary layoffs.

Hiram Walker further argues that the plant shut-down agreement provided that any employee who due to layoff received less than a full year of credited service for each such year. This agreement eliminated any complaint by any employee about pension benefits earned for 1973 and subsequent years.

INDIVIDUAL RELIEF PROVIDED BY THE CONSENT DECREE

The EEOC and Hiram Walker determined that any settlement should focus on individuals who (1) were initially assigned to the Bottling Line Division and (2) who demonstrated by their course of transfer

to other divisions that (a) they might have accepted an initial assignment to another seniority division and (b) they might have been successful in performing the work if initially assigned to another seniority division. The parties looked at such factors as whether such individuals voluntarily transferred to another seniority division and remained there for a reasonable period of time, and whether they accepted at least one to three involuntary transfers to other divisions to avoid layoff and successfully performed the work in those divisions.

The proposed Consent Decree provides for two forms of relief, direct monetary relief and pension relief. Pension relief is provided to all females hired prior to 1965 who, according to the criteria established by the parties, evidenced a willingness after 1965 to

hold a "man's job". The EEOC states that questionnaires were sent to all potentially eligible women and these womens' work histories were reviewed to determine eligibility. Eligible women hired prior to 1960 received two years additional credited service for purposes of determining monthly pension benefits, while those hired after 1960 received one year additional credit to service.

There are two forms of direct monetary relief under the proposed decree: (1) specific sums designated for specific individuals in the body of the decree, and (2) potential entitlement provided to charging parties who receive no specific relief under the decree.

The first form of relief, entitled "Initial Assignment Relief", is directed to women who were initially assigned to the Bottling Line Division and who during

the period from 1975 to 1981 demonstrated a willingness to hold a "man's job" through actual performance on the job. Eligibility for such relief was determined by computer and manual review of work history cards for all women employed during that period. Each work history was reviewed in light of the specific guidelines developed by the parties and each woman was given a lump sum for each year of eligibility. Initially, figures comparing the earnings of eligible females to those of males with comparable plant seniority were developed. With these figures in mind, the parties finally negotiated a total amount and determined annual lump sum payments by dividing that amount by the number of years of eligibility which had previously been determined for eligible women.

The second form of direct monetary

relief is given to charging parties who received no specific relief under the proposed decree. They are entitled to share in any specific sums awarded under the decree to women who are deceased or who cannot be located at the time of monetary disbursement.

OBJECTIONS TO PROPOSED CONSENT DECREE

Objections to the proposed Consent Decree were filed by women acting on their own behalf and by counsel representing some women.

Many women objected on the basis that large monetary awards were given to younger females with seniority periods substantially less than older females who were victims of sex discrimination for 30 to 40 years. The younger females, some objectors state, have seniority only from 1964 to 1979. Many objections also

state that out of the original 1975 charging parties, only eight were awarded two years of additional credited service for the purpose of determining monthly pension benefits. The objections assert that eight younger females were awarded one year additional credited service. One woman asserts that some of the younger females who have been awarded monetary provisions under the decree were not even employed at Hiram Walker at the time the charges of sex discrimination were originally filed. Many women believe that they continue to be discriminated against in the decree because of their age and their long employment at Hiram Walker and that the Commission has also discriminated against them by agreeing to such an unfair settlement. One woman, in addition, states that some women who received awards under the decree were poor workers

while good workers receive nothing.

With regard to pension benefits, many of the women object not only to their limited relief or lack of relief as compared to women awarded relief under the decree (who, the objectors say, worked a fewer number of years than they did), but also to their level of pension benefits as compared to benefits provided to males. Many of the women claim that they were laid off much more frequently than men and that because of this policy, they received fewer years of credited service than men who worked at the plant a comparable amount of time. Many compare the number of years they actually worked at the Hiram Walker plant to the number of years of credited service received. Some compare the service time of male employees hired at the same time as the women were hired, the years of credited

service, and the wide divergence in current monthly pension benefits. Some assert that they were not aware of the change in the collective bargaining agreement in 1966 whereby the Bottling Division was split into two divisions. Many objectors claim that not only have Hiram Walker's policies affected their small pension benefits, but the policies have also adversely affected the benefits they receive under Social Security.

Many of the women who object to the Consent Decree state facts similar to those stated by the EEOC, and relate some of their personal experiences which they believe evidence a history of discrimination on the part of the Company. Some tell of situations in which they told Hiram Walker representatives that they were willing to take "men's jobs" but were told that they were too small to do

the jobs or that the only jobs women would be offered was rolling full barrels of whiskey. In some instances the women state that they were given inadequate training periods on "men's jobs" or no assistance on "men's jobs" normally done by more than one person. Several objectors attest that when men were transferred to jobs on the Bottling Line, the work was made easier for them by slowing up the line or by assigning more men to the job. Some also state that they should not be punished now for refusing to take jobs, such as barrel rolling, which may have caused them physical harm.

The proposed Consent Decree, according to some women, does not take into consideration the system's discriminatory effect on women who over the years were discouraged from taking transfers. The framers of the proposed decree limited

monetary and pension relief to those women who beginning in 1973 took involuntary transfers instead of layoffs because of the framers' belief that the statute of limitations may limit relief to that time period. Such an interpretation, according to some objectors, disregards the fact that older employees were actively discouraged for years from attempting men's jobs and that discrimination against these women was continuous from the day they started work until the date of the plant closing on December 31, 1981, regardless of whether or not involuntary transfers were accepted. A contrary interpretation, one objector states, would pretend that the Company's pre- and post-1973 offers of "rack house jobs" (involving moving of 500 pound barrels of alcohol) were legitimate alternatives of employment for women that the Company, in effect, had

trained for years to routinely reject.

Several former employees assert that under the criteria established by the EEOC and Hiram Walker for determination of who receives relief under the decree, they are entitled to relief but that they are awarded nothing. One woman believes that the decree unfairly excludes her since she took regular transfers to "men's jobs" until 1973. Several women who are not provided with any relief in the decree and were not charging parties submitted a paper to this Court stating that they wish to be considered for monetary or pension relief or both.

One woman who has been quite active in the case and was an original charging party comments that she feels that the EEOC has experienced an extensive turn-over of attorneys which has been detri-mental to the case. She also refers to

her numerous attempts to obtain counsel to represent her in the proceedings, all of which proved futile.

DISPUTED LEGAL ISSUES

Several major legal issues affected the settlement of this dispute. First, the parties dispute whether the statute of limitations for back pay relief extends back to 1975 or 1973. Section 706(g) of Title VII, as amended, 42 U.S.C. §2000e-5(g), states that "back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission". At issue in this case is which charge is determinative of the relevant back pay period. Hiram Walker contends that the issues of assignment, layoff, promotion, and transfer are explicitly stated only in the 1977 charge and hence relief in these areas can extend

back only to 1975. The Commission contends that at the heart of the 1975 charges of pension discrimination is the fact that Hiram Walker's method of fixing credited service adversely affected women because of its concomitant discrimination in assignment, layoff, transfer and promotion. The EEOC argues that had the women been assigned, promoted or truly allowed to transfer to male jobs where layoff was less likely, the method of computation of pension benefits would not have been discriminatory. Thus, the Commission concludes that back pay relief should run from 1973.

Second, the parties dispute whether the seniority system of Hiram Walker was bona fide. Section 703(h) of Title VII, 42 U.S.C. §2000e-2(h), makes it lawful for an employer to apply different standards of compensation or different terms,

conditions or privileges of employment pursuant to a "bona fide seniority or merit system". The Commission contends that Hiram Walker's seniority system is not bona fide because it was intentionally structured to perpetuate past discrimination and to generate futher discrimination. Hiram Walker contests this conclusion contending that because the system governing layoff, promotion, and transfer was governed by a seniority system, its practices in those areas were not unlawful.

Third, Hiram Walker and the EEOC disagree on individual relief obtainable. Once a system-wide pattern and practice of sex discrimination is proved, every woman employee is presumptively entitled to relief, subject to a showing by the employer that the employee is not a victim of that discrimination. International

Brotherhood of Teamsters v. United States, 431 U.S. 324, 362 (1977). Hiram Walker argues that all it need show in order to demonstrate that a woman is not entitled to relief for any of the discriminatory practices alleged is that at some time during the relevant period she did not attempt to take a "man's job". The Commission, however, alleges that because the Union and Company created obstacles to women transferring into men's job, a woman's failure to take a man's job alone show nothing.

Hiram Walker states that the only "litigatable issue" in this case is with regard to initial assignments to seniority divisions. It states that initial assignments were made on the basis of the availability of openings and the personnel department's decision regarding where the new employee most likely would be

successful. This resulted, according to Hiram Walker, in an assignment pattern in which the proportion of females and males assigned to the seniority divisions was not the precise proportion of females to males hired. Hiram Walker contends, however, that the EEOC faces a substantial hurdle in any attack on initial assignments. Section 706 of Title VII prescribes a 300 day time limit for filing any EEOC charge in states, such as Illinois, which have a state statute applicable to the type of discrimination alleged. 29 U.S.C. §2000e-5(3). Under the rationale of United Airlines v. Evans, 431 U.S. 553 (1977), events with respect to which no timely charge is filed are treated as events with "no present legal significance". Given this time limit, Hiram Walker argues that even if the 1975 pension charges could be stretched to

reach allegedly discriminatory initial assignments, those charges could reach only those employees hired and therefore initially assigned within 300 days prior to April 19, 1975, the date the first pension charge was filed. Hiram Walker contends, however, that the assignment pattern from 1973 on does not establish ipso facto sex discrimination.

With regard to pension relief, the EEOC states that the shut down agreement entered into provided all women employees of Hiram Walker during the period of 1973 through 1981 the equivalent of the pension relief for that time period which could have been obtained in this litigation. The remaining question, according to the EEOC, is whether pension benefits beyond those already gained are obtainable. Hiram Walker argues that any adverse effect upon any individual was the result

of a voluntary choice made by that employee since an employee could use her plant seniority to avoid layoff or to transfer to another seniority division if she chose. Many female employees, however, Hiram Walker asserts, stated that the work in divisions other than the Bottling Line Division was too hard. Hiram Walker concludes that any adverse effect on the employee was the result of the employee's choice not to use her rights to her advantage.

Another dispute with regard to pension benefits is the form of relief which pension relief takes. The Commission contends that in this case pension relief would be injunctive because the value to be placed on the number of hours worked at Hiram Walker was a decision which was always subject to change until a person retired since only then were benefits

fixed. The Commission argues that relief for the effects of that decision would be in the form of an order enjoining Hiram Walker from paying benefits based on factors having a discriminatory effect to individuals who retired within the relevant limitations period. Because there is no statute of limitations for injunctive relief in Title VII, the Commission concludes that pension relief beyond that provided in the shut-down agreement would be obtainable.

Hiram Walker argues that pension relief is a form of back pay and is therefore recoverable beginning only two years before the filing of the charge. City of Los Angeles v. Manhart, 435 U.S. 702(1978). Hence, Hiram Walker concludes, no employee could gain any additional pension relief by litigating this case since full relief was obtained in the

shut-down agreement. So that certain female employees hired prior to 1965 might receive something with regard to pensions, Hiram Walker asserts, the parties agreed that any female hired prior to 1960 who tried on at least one occasion to perform work somewhere other than in the Bottling Line Division would receive two years additional credited service for pension purposes, and that any female hired between 1960 and 1965 who tried to perform work in another seniority division on at least one occasion would receive one additional year of credited service. Hiram Walker concludes that this relief clearly could not be obtained if the case were litigated and was provided solely to achieve settlement of this case.

INTERVENTION

The "Notice of Proposed Consent Decree, Opportunity to Object and Hearing on the Proposed Consent Decree", sent to charging parties and other affected individuals, stated that a woman did not file a charge of employment discrimination against either Hiram Walker and/or Local 55 will obtain only such relief as is provided in the Consent Decree and will have no further claims against either the Company or the Union arising out of any of the allegations involved in the litigation. If a woman filed a charge of employment discrimination with the EEOC in 1975 or 1977, the Notice went on to explain, she will obtain only such relief as is provided in the decree unless: (1) she intervenes in the lawsuit before this hearing and before final approval, or (2) she requests a Right to Sue letter from the Commission based upon her charge and

brings suit against the Company and/or the Union within 90 days after the receipt of that letter. If the Court determines that certain parties may intervene, the Notice stated that the Commission, the Company and the Union would still be free to seek approval of the proposed Consent Decree and thereby conclude the lawsuit between them. The Notice also stated that:

> "Depending on the purpose of your intervention and the Court's ruling granting your intervention, you then would be free to appeal from the court's order approving the consent decree, or to litigate alone against the company and/or the union." (Notice, p. 5).

If a woman is entitled to relief under the decree, the Notice informed her that she will have to refuse to accept such relief if she wishes to attempt to sue the Company and/or the Union.

As to the effect of the Consent

Decree on women affected by it, the decree itself states at page 5:

> "This Consent Decree is final and binding, as of the date of the final approval and entry of this Consent Decree, upon the EEOC, Hiram Walker and Local 55, and to the extent consistent with applicable law, upon Charging Parties and other individuals as to all claims raised in this action, or which could have been raised in this action. . . ."
> (Emphasis added).

Attorneys representing Hiram Walker, the EEOC and several of the objectors have submitted Court-requested briefs regarding the effect of the entry of the Consent Decree upon the rights of charging parties and others to litigate further against the Defendants. Hiram Walker suggests in its memorandum that this legal issue is not ripe for decision at this time because no actual controversy regarding such rights

has been presented to the Court. After the filing of the Court-requested briefs, however, the attorneys for several objectors filed Motions for Intervention. The intervention question is also a timely issue based on statements made by Hiram Walker and the EEOC in the Notice sent to affected individuals. The Notice states that a charging party, to pursue her objections or any further claims, must intervene in the lawsuit before the hearing and before final approval of the Decree.

The briefs in support of intervention filed by those objectors represented by Counsel argue that intervention as of right should be allowed for all charging parties because all four requirements of Rule 24(a), Fed.R.Civ.P., are met:

1) Timely application;

2) An interest relating to subject

matter of the action;

3) Potential impairment of that interest by disposition of the action; and

4) Lack of adequate representation of the interes by existing parties to the action.

One attorney goes on to argue that intervention should be allowed to all non-charging parties since they are similarly situated and allege the same discriminatory policies as those charging parties already represented in the action. See, e.g., Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Romasanta v. United Air Lines, Inc., 537 F.2d 915, 918 (7th Cir. 1976). Permissive intervention under Rule 24(b) is also sought for all parties not included in the proposed decree. Objectors Osborn and Bury conclude that while they request the right to intervene

should the proposed decree be approved, the right to intervention is actually no remedy for any interested party in that the economic disparity existing between each individual interested party and the Defendants is so great so as to disable the interested parties from pursuing their rightful claims against Hiram Walker.

At the hearing on objections to the proposed Consent Decree, the EEOC argued that charging parties would have a statutory right of intervention under Title VII and a right to appeal if the proposed Consent Decree were entered. The EEOC maintained that non-charging parties, whether or not they are entitled to relief under the Decree, could seek intervention as third parties based on their interest in the Consent Decree treating them in a manner which is fair.

In its memorandum to the Court on third parties' standing to appeal, the Commission markedly alters its position. The Commission now argues that entry of the Consent Decree would not prejudice charging parties since they could opt out and file a private lawsuit to fully litigate their interests, but intervention at this time by either charging parties or others with like or similar claims for the purposes of attempting to overturn final approval of this proposed Consent Decree would be untimely.

An individual not already a party must intervene in order to appeal a judgment in this case. According to the EEOC, the statutory right to intervene in any Commission case, under §706(f)(1) of Title VII, 42 U.S.C. §2000-5(f)(1), can only be invoked by charging parties or by persons on whose behalf a charge was filed.

The Commission claims that a non-charging party who has a discrimination claim which would be encompassed by this action may not intervene as of right, whether or not she formerly objected to the proposed decree.

Courts have recognized the right of an individual who did not file a charge to intervene in or join a private Title VII action where their claims are encompassed within that suit or are very like the government's claims. See, e.g., Foster v. Geuory, 655 F.2d 1319 (D.C. Cir. 1981); Crawford v. United States Steel Corp., 660 F.2d 663 (5th Cir. 1981). Under the circumstances of this case, however, the Commission asserts, such intervention would be inappropriate because non-charging parties could not show inadequacy of representation or timeliness necessary for non-statutory intervention

of right under Rule 24(a)(2), Fed.R.Civ.P.

The Commission cites numerous cases similar to the one at bar where a consent decree has been preliminarily or finally approved in the discrimination suit, and intervention has been denied on timeliness grounds. See, e.g., EEOC v. Westinghouse Electric Corporation, 675 F.2d 164 (8th Cir. 1982); Stotts v. Memphis Fire Department, 679 F.2d 579 (6th Cir. 1982); Alaniz v. Tillie L. Lewis Foods, 572 F.2d (9th Cir. 1978). The Commission goes on to discuss circumstances judged relevant to a determination of timeliness and concludes that if applications for intervention were filed under Rule 24(a)(1) or 24(a)(2), intervention should be denied on timeliness grounds. The Commission states that an applicant for intervention would have unjustifiable delayed her application so that the parties would now be prejudiced

severely by a grant of intervention while the applicant possibly would suffer no prejudice if her application were denied.

Hiram Walker disputes the right of any charging party to intervene at the current stage of the proceedings and further disputes the right of any charging party to intervene at the current stage of the proceedings and further disputes the right of any charging party to obtain a right-to-sue letter and file a new action. Hiram Walker states that although §706(f)(1) of Title VII does authorize charging parties to seek intervention in Title VII actions commenced by the EEOC, the EEOC in October of 1979 specifically notified each charging party of her right to intervene. Hiram Walker states that it will oppose any attempted intervention at this time as untimely.

Should the charging party choose to

seek a right-to-sue letter and initiate her own lawsuit against the Company or the Union after the entry of the Consent Decree, Hiram Walker will argue that a lawsuit cannot be filed under these circumstances. Although the Seventh Circuit Court of Appeals has not ruled on this issue, the Fourth Circuit held in Adams v. Proctor & Gamble Manufacturing Co., 697 F.2d 582 (4th Cir. 1983) en banc, that under §706(f)(1) of Title VII, suits by individuals who were charging parties but who did not intervene in a pending EEOC action brought on their behalf are precluded from initiating their own lawsuits once the EEOC action has been concluded by a consent decree. The Commission admits that the right of charging parties to file later suits is an open question in the Seventh Circuit. In its consideration and approval of the Consent

Decree, this Court views it as probable, under the Adams rationale, that a charging party could not initiate her own lawsuit after the case has been concluded by the Consent Decree.

With regard to the rights of a non-charging party to seek a right-to-sue letter and commence a separate action, Hiram Walker argues that, accepting the dicta in General Telephone Co. of the Northwest, Inc. v. EEOC, 446 U.S. 318 (1980), the Consent Decree theoretically would not bar a subsequent individual action by a non-charging party, provided that she waived her right to the relief provided to her by the Consent Decree and provided that she could still assert a timely cause of action. In reality, however, Hiram Walker states that non-charging parties would not be able to litigate further because any charge filed

by such an individual at this time would be time barred under Title VII's 300 day statute of limitations because none of the individuals involved have worked for Hiram Walker since 1981 at the latest. In addition, Hiram Walker claims, the non-charging parties may not intervene under Rule 24(b), Fed.R.Civ.P., which provides for permissive intervention only when either "a statute of the United States confers an additional right to intervene" or "an applicant's claim or defense and the main action have a question of law or fact in common". These requirements, according to Hiram Walker, are not met in this case.

With regard to the rights of charging parties and other individuals eligible for relief to appeal the entry of the final Consent Decree, Hiram Walker argues that class members must object to the

settlement of EEOC actions brought on their behalf in order to preserve any right of appeal. See, Research Corp. v. Asgrow Seed Co., 425 F.2d 1059 (7th Cir. 1970); Armstrong v. Board of School Directors, 616 F.2d 305 (7th Cir. 1980). Hiram Walker maintains that to hold otherwise would thwart the purposes served by the objection procedure, which was established by this Court and the parties to determine if the Consent Decree was fair and adequate.

In addition to timely raising their objection, Hiram Walker states that both charging parties and non-charging parties would be required to intervene for purposes of appeal before appealing the entry of the Consent Decree. Hiram Walker states that if this case involved a denial of class certification, intervention for the limited purpose of appeal

from entry of the Consent Decree would be possible by the charging parties and non-charging parties who filed timely objections to the Consent Decree. United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977). In addition, Hiram Walker states, if this were a true class action, those who filed timely objections could appeal entry of the Consent Decree. Hiram Walker goes on to state that:

> "(g)iven the objection procedures established by the parties to this matter, the right to intervene to appeal entry of the Consent Decree might be ruled appropriate in this case. However, those intervention rights would be limited to appealing the Court's entry of the Consent Decree, and the Court of Appeals would place a substantial, 'abuse of discretion' burden on one seeking to overturn the Consent Decree. (citation omitted)." Hiram Walker's Memorandum Regarding the Preclusive Effect of the

Final Consent Decree,
p. 15.

In considering the objector's rights to intervene at this stage of the proceedings, the Court views the language of the Notice sent to all persons affected by the Decree as important. The Notice informed charging parties that, unless they intervened before the hearing and before final approval to represent their personal interests in the lawsuit, or unless they received a Right to Sue letter and brought suit, they would have no further claims against either the Company or the Union. The Notice went on to state that if a woman chose to seek to intervene, either for the purpose of objecting formally or bringing her own lawsuit, the Court has authority to determine if intervention is appropriate.

This language in the Notice was

proceeded by a statement that:

> "the parties to the action have agreed that you may raise objections you may have regarding the proposed Consent Decree by filing a written statement of your objections, and appearing in court, with or without counsel. . . . Should you wish to pursue this course of action, more detailed information about the procedures to follow is provided below at pages 7-9." (Notice, p. 3)

At page seven, under a heading entitled "Procedures to be Followed for Objecting to the Proposed Consent Decree", the Notice stated that to object, a woman must file her objections in writing with the clerk of the court and mail a copy of the objections to the parties' attorneys. The Notice stated that an objector could, in addition, appear at the hearing before this Court. The Decree concluded that:

> "(i)f you believe that

> the relief for you under the terms of the proposed Consent Decree is inadequate, or you think you are entitled to additional or different relief, or you object for any other reason, you should object in the manner set forth above." (Notice, p. 9).

The language of the Notice in no way informs the affected women that in addition to filing a written statment of objections, they would be required to intervene for purposes of appeal before entry of the Consent Decree in order to pursue their possible right of intervention. A fair reading of the Notice by a person unfamiliar with Rule 24 of the Federal Rules of Civil Procedure could and would likely lead to the conclusion that the filing of a statement of objections would be the appropriate method for seeking to intervene in this suit.

Hiram Walker in effect admits that

the right to intervene to appeal entry of the decree may be appropriate in this case. While Hiram Walker feels somewhat bound by the wording in the Notice, the EEOC, in a flagrant turnabout from its position in the Notice and at the December 22, 1983 hearing, argues that any intervention for appeal purposes at this stage in the proceedings is untimely. The Commission contends that charging parties could instead opt out and file their own lawsuit. The Court views the position of the EEOC as somewhat illogical in that the Commission contends that the charging parties objecting to the decree cannot exercise the limited right of appeal but can exercise the far broader right of filing their own lawsuits. In addressing the changed position of the Commission, the Court is led to the conclusion that the EEOC's decision to oppose intervention

for the purposes of appeal was made in an effort to conserve the EEOC's resources (in that the EEOC would be required to continue litigation if an objector appealed where if an objector filed a new lawsuit, only the Company and the Union would be involved).

The Court is aware that the EEOC is required to act in the public interest, that the public interest may differ from individual interests, and that the Commission's decision to oppose intervention for the purposes of appeal may have been made based on the Commission's assessment of what the public interest required in this case. The Court, however, must balance the conflicting interests involved. The original charging parties whose claims form the base of this suit brought their charges in 1975 and 1977. Many of them kept abreast of the

various stages of litigation and stood ready to assist the EEOC in its investigation and prosecution of the case. It is undisputed that in 1979, the EEOC notified each charging party of her right to intervene and informed the women that the Commission must represent the public interest, which would not necessarily be the same as private interests. In practical terms, however, the financial ability of individual women to pursue a lawsuit of this type against a corporation the size of Hiram Walker is extremely limited, if not impossible.

Ironically, most of those women who were charging parties and endured (from their point of view) discriminatory effects for many years end up with no relief under the decree. On the other hand, women who started working at Hiram Walker in the 1970's and were subject to

discrimination, if at all, for a far fewer number of years, obtain proportionately greater relief under the decree. For the Court to now say that charging parties who objected to the decree cannot even appeal the entry of that decree would be contrary to the interests of justice. All charging parties who filed objections to the decree will, upon timely filing their motion, be granted leave to intervene for the purpose of appealing the entry of the Decree.

Despite the language in the Notice stating that noncharging parties have no further claim against either the Company or the Union but can obtain only such relief as may be provided in the Consent Decree, this Court believes that intervention by those women who are not charging parties but who did object is appropriate under Rule 24(b) of the Federal Rules of Civil Procedure. Rule 24(b)

provides for permissive intervention "where an applicant's claim or defense and the main action have a question of law or fact in common". Interventions have been allowed in Title VII suits to non-charging parties where the applicants were similarly situated and received the same discriminatory treatment as the original plaintiffs. See, e.g., Foster v. Gueory, 655 F.2d 1319 (D.C. Cir. 1981); Lilly v. Harris-Teeter Supermarkets, 545 F.Supp. 686 (N.D. N.C. 1982). Many women who did not file charges in the case at bar participated in the prosecution of the suit by answering questionnaires sent to them by the EEOC. Some have expressed confusion as to whether they were or were not charging parties. Many endured (in their opinion) discriminatory treatment for years. If these applicants can show that their claim and the main action have

a question of law or fact in common, this Court will grant them leave to intervene. The Court finds that the interests of justice favor intervention although it could result in some delay or prejudice to the adjudication of the rights of the original parties. Further, in view of the women's lack of resources to litigate an action against Hiram Walker and/or the Union, their reliance on the EEOC to litigate in their interests was justified and their applications to intervene at this time when it now appears to them that that reliance may have been unjustified is not untimely.

Those women (charging and non-charging parties) who expressed no objection to the proposed Consent Decree will not be granted leave to intervene. This case, especially since its transfer to this Court, has maintained a high profile in

the local media. Those women who are named in the decree and all charging parties received notice of the proposed decree. Any application for intervention by those who have not objected to the proposed decree at this stage of the proceedings will be deemed untimely.

STANDARD OF REVIEW

In Airline Stewards and Stewardess' Association, Local 550 v. American Airlines, 553 F.2d 960, 963 (7th Cir.), cert. denied 439 U.S. 876 (1978), the Seventh Circuit stated that "it is a well settled principle that the law generally favors the encouragement of settlements". The EEOC asserts that this is particularly true in Tile VII cases since in that legislation Congress intended to make voluntary conciliation and settlement "the preferred means" for resolving

allegations of employment discrimination. Alexander v. Gardner-Denver Company, 415 U.S. 36, 44 (1974).

In approving a settlement, the court "need not inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy". Metropolitan Housing Development Corp. v. Village of Arlington Heights, 616 F.2d 1006, 1014 (7th Cir. 1980). The court "need only determine that the settlement is fair, adequate, reasonable and appropriate under the particular facts and that there has been valid consent by the concerned parties (citation omitted). Objectors must be given reasonable notice and their objections heard and considered". 616 F.2d at 1014. In Metropolitan Housing, the Seventh Circuit determined that the trial judge had fulfilled his responsibilities in determining that the

settlement was fair, adequate, reasonable and appropriate by receiving objections, holding an evidentiary hearing, and entering comprehensive findings, a conclusion, and an opinion after all parties had the opportunity to file briefs and proposed findings and conclusions. The Seventh Circuit went on to state that when an agreement had been approved by a district court, "it will not be reversed on appeal unless there is plain error or an abuse of discretion or if the court acted arbitrarily or failed to satisfy itself that the settlement was equitable and in the public interest (citation omitted)". 616 F.2d at 1015.

APPROVAL OF THE CONSENT DECREE

If this Court were to deny this proposed settlement, there is a real possibility that the litigation would continue

for an extended period of time. If the case were to go to trial, the trial itself could easily take three to four months or more, with tremendous costs to all parties.

Counsel for the objectors have suggested that, if this Consent Decree is denied, the EEOC and Hiram Walker would come back in later with a new proposed settlement that would more fairly recognize the position of their clients. It is possible that such would occur. But the Court cannot speculate as to what would happen as to further settlement discussions if I denied this proposed settlement. I can only assume at this time that the case would go to trial.

In approving the Consent Decree, the Court is painfully aware of the bitter feelings of most if not all of the long term (20-40 year) employees who filed objections concerning what they believe

to be the total inadequacy of this settlement to address the wrongs to which they assert they were subjected. They may be right. That is why, in addition to what I believe are sound legal reasons, I have determined that they should have the right to intervene for purposes of challenging this Consent Decree on appeal.

In addition to consideration of the objectors' complaints and claims, the Court has carefully considered the numerous disputed legal issues involved in this case. If any one or more of those hotly contested issues were decided in favor of Hiram Walker, the end result could be no relief at all, or at least less relief than is contained in the Consent Decree. The Court is not convinced that the legal issues involved are well settled in favor of the EEOC position. I perceive that there is an inherent risk to all parties

if this case were to go to trial.

Many women object to the settlement because they believe that the discrimination involved as to them went back many years before 1965. Some of the women began working for Hiram Walker in the 1930's and 1940's. Title VII, however, enacted in 1964, cannot reach those practices. See, e.g., Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).

As to back pay, relief under Title VII is limited to two years prior to the time charges were filed. Consequently, monetary relief regarding wages could not be obtained for any practices prior to 1973 even if this case went to trial. The parties dispute the extent to which pension relief is obtainable under the facts of this case. If Hiram Walker were to prevail on that issue at trial, no

further pension relief would be obtainable by anyone, not even that relief provided in the Consent Decree.

On pages 9 and 10 of this Order, the Court explained the methods used to determine which of the employees would receive specific relief, either in terms of direct monetary relief, or pension benefits, or both. Inevitably, there exists a degree of arbitrariness in developing such a formula. It is not the Court's function here to opine as to whether I would have arrived at a different formula. The issue is whether or not such a formula results in relief which, under all the circumstances, is fair and reasonable.

Given the inherent risks created by the legal issues in this case, the Court believes that the proposed settlement minimally meets the test of fairness and reasonableness. Approval of the Decree

will provide some relief for several women now instead of at the conclusion of more years of litigation (or perhaps not at all). Weighing all of these factors, the Court concludes that the settlement is equitable and in the public interest.

WHEREFORE, it is herewith Ordered:

1) The Final Consent Decree is approved by the Court.

2) Charging and non-charging parties who failed or chose not to object to entry of the Consent Decree are barred from intervention for purposes of appeal of the Consent Decree.

3) Charging parties who have previously filed a Motion to Intervene are granted the right to intervene for purposes of appeal of the Consent Decree.

4) Charging parties who file an appropriate Motion to Intervene within 14 days of today's date will be granted

the right to intervene for purposes of appeal of this Consent Decree.

5) Non-charging parties who have filed objections to the approval of the Consent Decree have 14 days from today's date to file a Motion to Intervene. Said Motion shall include, among other things, the dates of their employment at Hiram Walker. If the Court determines that the non-charging party seeking to intervene has a claim involving a common question of las or fact with 83-1024, the Court will allow intervention for purposes of appeal of the Consent Decree.

6) Non-charging parties who have previously filed Motions to Intervene are hereby granted the right to intervene for purposes of appeal of the Consent Decree, the Court finding that each of them has a claim involving a common question of law or fact with 83-1024.

The Court will enter the "Final Consent Decree in Full Resolution of Action", and said Consent Decree shall become effective, on the date the Court rules on additional Motions to Intervene. If no such motions are filed, said entry shall occur 15 days from today's date.

ORDER ENTERED: January 26, 1984.

/S/ MICHAEL M. MIHM
Michael M. Mihm
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	
v.	)	No. 83-1024
HIRAM WALKER AND SONS, INC., and DISTILLERY WORKERS OF AMERICA, LOCAL 55,	)	
Defendants.	)	

O R D E R

Motions to Intervene in this suit were filed by a number of women. In accord with the language and reasoning in this Court's Memorandum Opinion and Order of January 26, 1984, as amended March 13, 1984, it is herewith ordered:

1) The Motions of Ellen M. Shaffer and Deborah Becktron are DENIED due to their failure to object to entry of the Consent Decree.

2) All other Motions to Intervene are GRANTED as being timely filed and after objection to entry of the Consent Decree. Charging parties who filed Motions to Intervene are granted the right to intervene under Rule 24(a)(2) of the Federal Rules of Civil Procedure, for purposes of appeal of the Consent Decree. Non-charging parties who filed Motions to Intervene are granted the right to intervene, under Rule 24(b)(2), for purposes of appeal of the Consent Decree, the Court finding that each of them has a claim involving a common question of law or fact with 83-1024.

ORDER ENTERED: March 13, 1984.

/S/ MICHAEL M. MIHM
Michael M. Mihm
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	
v.	)	No. 83-1024
HIRAM WALKER AND SONS, INC., and DISTILLERY WORKERS OF AMERICA, LOCAL 55,	)	
Defendants.	)	

AMENDMENT TO
MEMORANDUM OPINION AND ORDER

This Court's Memorandum Opinion and Order entered January 26, 1984, is amended as follows:

Paragraph 3, page 36: "Charging parties who have previously filed a Motion to Intervene are granted the right to intervene, under Rule 24(a)(2) of the Federal Rules of Civil Procedure, for purposes of appeal of the Consent Decree.

Paragraph 6, page 36: "Non-charging parties who have previously filed Motions to Intervene are hereby granted the right to intervene, under Rule 24(b)(2) of the Federal Rules of Civil Procedure, for purposes of appeal of the Consent Decree, the Court finding that each of them has a claim involving a common question of law or fact with 83-1024."

ORDER ENTERED: March 13, 1984

/S/ MICHAEL M. MIHM
Michael M. Mihm
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	
Plaintiff,	
v.	No. 83-1024
HIRAM WALKER & SONS, INC.	
and	
DISTILLERY WORKERS OF AMERICA, LOCAL 55,	
Defendants.	

FINAL CONSENT DECREE
IN FULL RESOLUTION OF ACTION

This Consent Decree is in full and final resolution of this action commenced by the Equal Employment Opportunity Commission ("the EEOC") on September 27, 1979, alleging that Defendants Hiram Walker & Sons, Inc. ("Hiram Walker") and Distillery Workers of America, Local 55

("Local 55") had violated and were continuing to violate Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. ("Title VII"). The EEOC's Complaint was based upon EEOC charges filed in 1975 and 1977. In this lawsuit, the EEOC alleged that Defendants Hiram Walker and Local 55 maintained employment practices which discriminated on the basis of sex against women employed by Hiram Walker at Hiram Walker's Peoria facilities and represented by Local 55. Hiram Walker and Local 55 denied all allegations of discrimination and advanced numerous affirmative defenses.

Subsequent to the filing of this lawsuit, Hiram Walker's Peoria, Illinois facilities were permanently closed, effective December 31, 1981. No Charging Party or other individual entitled to relief under this Consent Decree now is

employed by Hiram Walker.

After extensive pre-trial discovery, involving depositions of many potential witnesses, including individual Charging Parties, other Hiram Walker female employees, Hiram Walker managers and Hiram Walker retirees, interrogatories, full production of documents by all parties, and expert studies and reports, the parties have agreed upon this Consent Decree in full and final resolution of all claims and issues raised or which might have been raised in this action, subject to approval of the Court. The parties have determined that resolution of this action, on the terms set forth herein, is in the best interests of the parties and the public.

After reaching agreement on the terms of this Consent Decree, the parties jointly moved for preliminary approval

of this Consent Decree. Pursuant to that motion and the parties' representations, the Court preliminarily approved this Consent Decree, scheduled a hearing on its fairness and adequacy, and directed that notice of that hearing, in the form attached hereto and made a part hereof as Exhibit A, be sent to all Charging Parties and other individuals entitled to relief under the Consent Decree, such Charging Parties and other individuals being listed on Exhibit B to this Consent Decree.

The hearing on the fairness and adequacy of this Consent Decree having been held, the Court having carefully considered the arguments and presentations of all who filed written objections and who appeared at that hearing, and being fully apprised,

THE COURT FINDS:

1. This Court has jurisdiction over

the subject matter of this action and the parties.

2. The provisions of this Consent Decree are fair, adequate and reasonable.

3. This Consent Decree is in the best interests of the parties and the public.

THEREFORE, THE COURT ORDERS AND DECREES:

I. NONADMISSION AND NONDETERMINATION

Hiram Walker and Local 55 deny that any of their acts, omissions, practices, policies, benefit plans or collective bargaining agreements discriminated against any Hiram Walker employee on the basis of sex in violation of any federal, state or local law, order or legal principle. There has been no determination that either Hiram Walker or Local 55 has violated any federal, state or local law, order or legal principle with respect to

sex discrimination in employment. This Consent Decree shall not be construed in any respect, and shall not be admissible in any proceedings, as evidence of an admission, express or implied, that either Hiram Walker or Local 55 has violated any federal, state or local law, order or legal principle.

II. DISMISSAL OF CROSS-CLAIMS

(A) After the EEOC filed its Complaint in this action, Hiram Walker filed a cross-claim against Local 55 in which it alleged that Local 55 was responsible for any liability which might be found, and Local 55 filed a cross-claim against Hiram Walker alleging that Hiram Walker was responsible for any liability which might be found. The cross-claims of both Hiram Walker and Local 55 hereby are withdrawn and dismissed, with prejudice.

(B) Further, Local 55 hereby waives

any right to object to this Consent Decree that Local 55 might have as a result of being the Charging Party in EEOC Charge Number TCH 5-3129.

III. EFFECT OF DECREE

(A) This Consent Decree is final and binding, as of the date of final approval and entry of this Consent Decree, upon the EEOC, Hiram Walker and Local 55, and to the extent consistent with applicable law, upon Charging Parties and other individuals as to all claims raised in this action, or which could have been raised in this action, against Hiram Walker or Local 55 by the EEOC, by any Charging Party, or by any individual or entity, relating to or arising out of alleged discrimination on the basis of sex with respect to female employees of Hiram Walker employed at Hiram Walker's Peoria facilities and represented by

Local 55.

(B) (1) The EEOC agrees never to institute, directly or indirectly, any action or proceeding of any kind against Hiram Walker, Local 55, or any of their respective directors, officers, employees or agents with respect to any claim or obligation of any nature based on alleged discrimination on the basis of sex against females formerly employed by Hiram Walker at its Peoria, Illinois facilities and formerly represented by Local 55, or to become a party to any such action or proceeding.

(2) The EEOC further agrees never to disclose, except to the extent required by applicable law, to any person or entity (including, but not limited to, any Charging Party) any of the documents (including but not limited to, computerized information or studies and experts'

studies and reports) which the EEOC or its agents generated, obtained or reviewed in connection with its investigation of EEOC Charges Number TCH 5-2802 et al., TCH 5-3129 and 051771958, or in connection with its participation in this Civil Action Number 83-1024. In the event of any request to the EEOC for disclosure of any of such documents, the EEOC is threatened with a court order directing disclosure of such documents, as a result of the filing of an action under the Freedom of Information Act, the service of a subpoena duces tecum, or otherwise, the EEOC shall immediately notify Hiram Walker, shall invite Hiram Walker's participation, intervention and appearance in any such proceeding, and shall assert in any such proceeding all appropriate legal privileges or other bases for withholding the documents sought which

are supported by applicable law. If the EEOC is required to disclose any such document, either by court order or because the EEOC is legally obligated to disclose such document to the person or entity requesting such document, the EEOC shall provide Hiram Walker with the opportunity to copy such document at or before the time it is disclosed.

IV. EFFECTIVE DATE OF DECREE

This Consent Decree shall become effective upon its entry. However, Hiram Walker need make no payment under this Consent Decree until the later of (A) the 65th day following entry of this Consent Decree, or (B) the date of final judicial approval of this Consent Decree by order of the District Court and the exhaustion of all appeals or rights of appeal from that order. However, Hiram Walker need take no action under this Consent Decree,

and this Consent Decree shall be null and void, if any such appeal results in disapproval of this Consent Decree.

V. MONETARY PROVISIONS

(A) Pension Relief

Subject to Part V(C) of this Consent Decree, Hiram Walker will provide the following former Hiram Walker employees two (2) years additional credited service for purposes of determining their monthly pension benefits from Hiram Walker:

Celia Becker

Freda Goldsmith

Clara Maricle

Helen Doty

Dorothy Genovese

Susie Parker

Louisa Harvey

Laura Bury

Subject to Part V(C) of this Consent Decree, Hiram Walker will provide the

following former Hiram Walker employees one (1) year additional credited service for purposes of determining their monthly pension benefits from Hiram Walker:

Pauletta Trammel

Betty Latvitis

Jesse Wright

Linda Morris

Barbara Mitchell

Virginia Pannell

Teri Shelton Hayes

Karen Gouveia

The foregoing adjustments to these former Hiram Walker employees' credited service shall be effective the month following the month in which this Consent Decree becomes effective. Although the adjustments to pension credited service shall be effective in such month, Hiram Walker need make no payment which might be required by such adjustment either

prior to the time permitted by Part IV of this Consent Decree or prior to Hiram Walker's receipt of the properly executed general release required by Part V(C) of this Consent Decree.

(B) Initial Assignment Relief

(1) Subject to Part V(C) of this Consent Decree, Hiram Walker shall pay the following individuals, all of whom were hired before 1977, the amounts listed below, less applicable withholding and other tax deductions:

Name	Amount
Linda Aberle	5,400
Judith Bolam	1,800
Luanne Brackett	4,050
Sandra Campbell	5,400
Judy M. Clark	1,800
Leola Clark	900
Myrna Closen	5,400
Karen Colvin	1,800

Carol Craig	900
Helen Doty	1,800
Theresa Earp	900
Linda Floyd	1,800
Mary Freeman	1,800
Karen Gouveia	900
Geraldine Harris	900
Teri Shelton Hayes	5,400
Vicki Heubi	2,700
Linda Hinkle	1,800
Odessa Hinton	900
Carole Hoffman	900
Margaret Hopwood	1,800
Sharon Inman	900
Connie Kendall	5,400
Sherry Kerley	900
Deborah Kilver	2,250
Bonnie Kumer	900
Betty Latvitis	900
Karen Leitner	4,950
Nancy Marlott	900

Laurel Maynard	1,800
Barbara Mitchell	900
Delilah C. Moore	900
Sandra Newman	4,500
Betty Jean Nicholas	2,700
Virginia Pannell	900
Maria Peyton	4,500
Berbel Pfahl	2,700
Virginia Rakestraw	5,850
Pam Robb	900
Vida Rubnich	900
Elaine Schneider	1,800
Carol Smiles	5,400
Linda Stenstrom	1,350
Deborah Swearingen	4,500
Pauletta Trammel	4,500
Marianne Topper	4,500
Robbie Van Laningham	5,400
Bev Verardo	2,700
Anna Walls	900
Dorothy Williams	1,800

Mattie P. Williams	4,500
Carole B. Williamson	3,600
Barb Wood	5,400
Ruby Wulf	3,600
Londia Wyatt	4,500
Pam Yackle	1,350
Donna Yanone	900
Gen. Yanone	1,800

(2) Subject to Part V(C) of this Consent Decree, Hiram Walker shall pay the following individuals, all of whom were hired in 1977 and 1978, the amounts listed below, less applicable withholding and other tax deductions:

Name	Amount
Cinda Adams	$ 900
Nancy Bozarth	225
Yvonne Brandle	450
Debra Beaty	450
Marlene Bennett	675
Peggy Carrington	900

Edna Dibler	450
Diane Dierker	225
Constance Donald	900
Linda Dudley	900
Lori Ferrill	450
Bettie Hammons	900
Janice Hanson	225
Pamela Heinz	450
Janet Hill	675
Beverly Jackson	675
Cheryl Laitas	450
Cheryl Lamie	900
Pat Lane	675
Raenel Miner	675
Katherine Mabee	450
Jolene Schuk	675
Sarah Short	450
Suzanne Thatcher	675

(C) Releases and Payment Procedures

(1) As a condition of receiving either the foregoing additions to credited

service for purposes of calculating monthly pension benefits or payments, the individual named first must execute a general release in the appropriate form attached hereto and made a part hereof as Exhibits C-1, C-2, and C-3. Within thirty (30) days following the effective date of this Consent Decree, Hiram Walker, with the assistance of the EEOC, shall notify each individual of her entitlement to the relief indicated, by mailing notification (by certified mail, return receipt requested), together with an original and two (2) copies of the appropriate general release to her last known address. The notice to be mailed by Hiram Walker shall indicate that the individual must sign and return to the EEOC the original and one (1) copy of the general release within thirty (30) days after receipt of the notice. Any individual who does not do so will be

deemed to have waived her claim to relief under this Consent Decree. The EEOC will provide the original of the release to Hiram Walker, and Hiram Walker's obligation to pay each individual is conditioned upon Hiram Walker's receipt of such properly executed general release from such individual.

(2) If any such notices are returned as undeliverable by the United States Post Office, and if, after both Hiram Walker and the EEOC exercise due diligence in searching for an individual for sixty (60) days after return of the notice, the parties are unable to ascertain her whereabouts, or if she is deceased, Hiram Walker's obligation to her shall terminate. If such an unlocatable or deceased individual was eligible for relief under Part V(B) of this Consent Decree, the amount which she was eligible to receive shall be

divided equally among the Charging Parties (other than Local 55 and the National Organization for Women, Peoria Chapter) named on Exhibit B to this Consent Decree who (1) are living; (2) receive no relief under either Parts V(A) or V(B) of this Consent Decree; and (3) properly execute a general release in the form attached hereto as Exhibit C-3 and return it to the EEOC within thirty (30) days after receiving from Hiram Walker (by certified mail, return receipt requested) notice of eligibility for relief under this Consent Decree. The EEOC will provide the original copies of the releases to Hiram Walker, and Hiram Walker's obligation to pay is conditioned upon receipt of such properly executed general releases. If the minimum amount which possibly could be distributed to a potential recipient under this Part V(C)(2) is under $10.00, Hiram Walker

will supplement the amount available under this Part V(C)(2) so that the minimum amount which possibly could be distributed to a potential recipient is $10.00.

(3) (a) Within ninety (90) days after the date Hiram Walker mailed the notice required by Part V(C)(1) of this Consent Decree, unless extended by agreement between the EEOC and Hiram Walker, Hiram Walker shall (1) mail a check in the appropriate amount to each individual eligible for relief under Part V(B) of this Consent Decree from whom Hiram Walker has received the properly executed general release and (2) implement the adjustments to credited service and make any necessary payments to each individual eligible for relief under Part V(A) of this Consent Decree from whom Hiram Walker has received the properly executed general release.

(b) Within one hundred fifty

(150) days after the date Hiram Walker mailed the notice required by Part V(C)(1) of this Consent Decree, unless extended by agreement between the EEOC and Hiram Walker, Hiram Walker shall mail a check in the appropriate amount to each individual eligible for relief under Part V(C)(2) of this Consent Decree.

(c) However, Hiram Walker's obligation under this Part V(C)(3) is subject to Part IV of this Consent Decree.

VI. ATTORNEYS' FEES, EXPENSES AND COSTS

Each party shall bear its own attorneys' fees, expenses, and costs incurred in this proceeding. However, no party shall be precluded from seeking to recover attorneys' fees expenses or costs from someone other than a party to this action in the event of litigation challenging this Consent Decree or litigation with respect to alleged sex

discrimination in employment.

VII. DURATION AND ENFORCEMENT

This Consent Decree shall terminate one hundred eighty (180) days after final judicial approval as described in Part IV of this Consent Decree, unless, for good cause shown, the Court orders that it be continued for a time certain beyond that one hundred eighty (180) day period. This Consent Decree may not be extended under any circumstances if Hiram Walker's obligations under Part V of this Consent Decree have been fully satisfied. Any disputes concerning compliance with the terms of this Consent Decree may be submitted by any party or by any individual entitled to relief under the terms of this Consent Decree to the Court so long as this Consent Decree remains in effect. When this Consent Decree terminates, neither Hiram Walker nor Local 55 shall have any further

obligation under this Consent Decree. The general releases executed pursuant to Part V(C) of this Consent Decree shall not be affected by the termination of this Consent Decree.

ORDERED this 13th day of March, 1984.

/S/ MICHAEL M. MIHM
Judge,
United States District Court

AGREED AND CONSENTED TO BY:

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

By /S/
One of Its Attorneys

HIRAM WALKER & SONS, INC.

By /S/
One of Its Attorneys

LOCAL 55, DISTILLERY WORKERS OF AMERICA

By /S/
One of Its Attorneys

Supreme Court, U.S.
FILED
JUN 6 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1587

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DELORES AGEE, et al.,

Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, HIRAM WALKER & SONS, INC., a corporation and DISTILLERY WORKERS OF AMERICA, LOCAL 55

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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No. 85-1587

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

DELORES AGEE, et al.,

Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, HIRAM WALKER & SONS, INC., a corporation and DISTILLERY WORKERS OF AMERICA, LOCAL 55

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

Hiram Walker & Sons, Inc.,[1] Respondent herein, submits this Brief In Opposition to the Petition for Writ of Certiori filed in this proceeding. Respondent does not challenge Petitioner's Jurisdictional Statement or its statement of the Constitutional provisions and statutes involved, and also does not challenge Petitioners' Statement Of The Case except as to argument and innuendo contained therein. Respondent does challenge Petitioners' statement of the questions presented for review, believing the sole question to be the following:

[1] Pursuant to Rule 28.1 of this Court, Respondent has appended to this Brief In Opposition a list naming all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of Respondent.

Whether the Seventh Circuit erred in holding that the district court did not abuse its discretion in determining that the consent decree was "a fair, reasonable, and adequate resolution of this litigation."

REASONS FOR DENYING THE WRIT

The decision of the United States Court of Appeals for the Seventh Circuit provides no basis for the grant of certiorari, and the Petitioners do not set forth reasons for granting the writ which conform in any way to the guidelines set forth in Supreme Court Rule 17. The district court's approval of the final consent decree was set forth in a comprehensive, thirty-six page memorandum which addressed all the factors that a district court should consider in making a "fairness" determination with regard to a Title VII class action settlement. The Seventh Circuit then upheld the district court's fairness determination utilizing the accepted judicial standard for appellate review of such a determination. The Petitioners attack the consent decree as being unfair and inadequate, but they do not assert that the district court abused its discretion in approving the consent decree, nor do they assert that the Seventh Circuit utilized an improper standard for appellate review of the district court's exercise of discretion. Petitioners do not assert that there is a conflict among the circuits with respect to either the proper standard for appellate review or the criteria to be utilized by a district court in making a fairness determination, nor do they assert that either the court of appeals or the district court in this proceeding departed so far from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Petitioners do not assert that the Seventh Circuit here decided an important question of federal law which has not been, but should be, settled by this Court, nor do they assert in any properly cognizable fashion that the Seventh Circuit decided a federal question in a way which is in conflict with applicable decisions of this Court. In

short, Petitioners challenge the consent decree, but in the process do not raise any issue worthy of Supreme Court review.

A. Petitioners' Arguments In Support Of Their Petition Miss The Issue.

Petitioners argue that the consent decree approved by the district court in settlement of this Title VII action "defeats the purpose of Title VII" (Petition, at 9) and also that it offers "insignificant settlement awards and pension relief" pursuant to "arbitrary and capricious criteria" (Petition, at 17). These arguments are phrased and posited as though they were an attack upon the relief ordered by a district court following a fully-litigated trial on the merits which resulted in a finding of discrimination by the Respondent in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* But such is not the posture of this case. The consent decree under attack is the product of a *settlement* between the EEOC, as the United States government's employment discrimination enforcement agency, and the Respondents Hiram Walker & Sons and the Distillery Workers of America, Local 55. It was not based on any adjudication of liability on the part of Hiram Walker & Sons, Inc.

The difference between the exercise of a court's remedial powers following a finding of discrimination and its discretion in determining whether a voluntary settlement is "fair, reasonable and adequate" is readily apparent but must constantly be kept in mind. The Seventh Circuit's observation in *Armstrong v. Board of School Directors,* 616 F.2d 305, 314-15 (7th Cir. 1980) is particularly appropriate here:

> In making its fairness determination, the district court must not forget that it is reviewing a settlement proposal rather than ordering a remedy in a litigated case. As the Second Circuit noted:
>
> > "The Court must eschew any rubber stamp approval in favor of an independent evaluation, yet, at the same time, it must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case."
>
> *Detroit v. Grinnell Corp.,* 495 F.2d 448, 462 (2d Cir. 1974).

Both the district court and the court of appeals at all times remained cognizant of this distinction. In its decision upholding the district court's approval of the consent decree here, the Seventh Circuit said:

> The district court should refrain from resolving the merits of the controversy or making a precise determination of the parties' legal rights. ... The essence of settlement is compromise. ... Each side gains the benefit of immediate resolution of the litigation and some measure of vindication for its position while foregoing the opportunity to achieve an unmitigated victory. ... *Thus, the parties to a settlement will not be heard to complain that the relief afforded is substantially less than what they would have received from a successful resolution after trial.*

(Pet. App., at A9; citations omitted; emphasis added.)

Yet, the distinction so carefully kept in mind by the courts below has been lost on the Petitioners, *and they continue to complain that they were denied relief to which they allegedly would have been entitled only upon a judicial finding of discrimination.* Thus, the Petitioners contend that "[t]he purpose of Title VII is to put the discriminated plaintiff in a place he would have been but for the discrimination," and that "[t]he plaintiff is entitled to all benefits he would have gotten had there not been a discriminatory act." (Petition, at 10). This argument was raised below and dismissed without difficulty by the Seventh Circuit:

> [A]ppellants seek a favorable ruling from this court by appealing to the acknowledged remedial goal of Title VII to make whole the victims of sex discrimination. ... The problem with appellants' argument is that the principle that they cite applies only after there has been a judicial determination or a concession of liability. There can be no court-imposed remedy without a finding of liability. In the present case, there has been no such finding. The parties reached a settlement without a concession of liability by defendants and with the substantial possibility that trial would entirely absolve defendants. As one court has stated

> in a similar situation, the duty of a district court to make whole a victim of discrimination "arises only after a judicial determination of discrimination. A court asked to approve a compensation procedure established pursuant to a consent decree in which discrimination is neither admitted nor proven is in a fundamentally different position." *United States v. Trucking Employers, Inc.*, 561 F.2d 313, 317 n.13 (D.C. Cir. 1977).

(Pet. App., at A14.)

B. The District Court Applied The Proper Standards In Approving The Consent Decree.

Because the district court's task was not to frame a remedy based on a finding of discrimination, but rather to review a settlement to determine whether it is "lawful, fair, reasonable, and adequate" (Pet. App., at A8), its role necessarily is a limited one. "[T]he district court must clearly set forth in the record its reasons for approving the settlement in order to make meaningful appellate review possible," *Armstrong v. Board of School Directors,* 616 F.2d at 315, while at the same time avoiding a judgment on the merits. The reasons for this limited role are clear. As the Seventh Circuit said in *Armstrong:*

> Because settlement of a class action, like settlement of any litigation, is basically a bargained exchange between the litigants, the judiciary's role is properly limited to the minimum necessary to protect the interests of the class and the public. Judges should not substitute their own judgment as to optimal settlement terms for the judgment of the litigants and their counsel.

Id.

As reflected by the opinion below, the district court in the instant case paid careful attention to its role and conscientiously applied the appropriate standards. In *Armstrong v. Board of School Directors,* 616 F.2d at 314, and again in *Gautreaux v. Pierce,* 690 F.2d 616, 631 (7th Cir. 1982), the Seventh Circuit had set down considerations, drawn from the *Manual for*

Complex Litigation § 1.46 at 56-57 (West 1977) and from 3B Moore's *Federal Practice* ¶ 23.80[4] at 23-521 (2d ed. 1978), for the making of a fairness determination. The key factors, as set forth in Petitioners' Appendix at A8, are:

> [A] comparison of the strengths of plaintiffs' case versus the amount of the settlement offer; the likely complexity, length, and expense of the litigation; the amount of opposition to the settlement among affected parties; the opinion of competent counsel; and the stage of the proceedings and the amount of discovery already undertaken at the time of settlement.

Of these factors, the Seventh Circuit noted, in agreement with the courts of the Second, Fourth, Fifth, and Eighth Circuits, the first is the most important. Pet. App., at A8; *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 455 (2d Cir. 1974); *Flinn v. FMC Corp.*, 528 F.2d 1169 (4th Cir. 1975), *cert. denied*, 424 U.S. 967 (1976); *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982); *Grunin v. International House of Pancakes*, 513 F.2d 114 (8th Cir. 1975).

Reviewing the district court's application of the appropriate factors, the court of appeals said:

> [T]he district court gave careful consideration to the claims raised below by appellants and denied them relief only after a comprehensive, thirty-six page opinion. The court specifically addressed all the factors delineated in *Gautreaux*. The court properly focused its analysis on a comparison of the settlement benefits — acknowledged to be not overly generous, especially with respect to those women employed the longest — with the likely outcome of litigation. The court noted the great uncertainty about the proper resolution of a number of legal issues involved, any one of which, if resolved in favor of Walker, would result in no recovery for any of the affected women, even those who received benefits under the decree. While the number of objectors clearly concerned the district court, nevertheless, the court concluded that, on balance, the substantial risks of litigation and the time and expense that a long trial would require justified the settlement.

(Pet. App., at A10-11). Because the district court applied and gave appropriate weight to all relevant factors, the Seventh Circuit upheld the district court's determination.

The Seventh Circuit went on to observe that "[e]xcept for the number of objectors, none of the factors that have caused appellate courts to view certain cases with scepticism is present in this case." Pet. App., at A11. The two major objections advanced by the Petitioners — the allegedly adverse impact on the more senior females who allegedly "suffered the most discrimination," and the size and criteria for recovery — do not fall within this list of factors. Instead, as the court of appeals found, the district court carefully scrutinized the Petitioners' claims and concluded, on balance, that the relief afforded by the settlement was fair, reasonable and adequate. "There is no showing," the Seventh Circuit said, "that the amounts received by the beneficiaries of the settlement were totally inadequate .... Similarly, none of the women excluded from relief by the decree has established that she should have been included." Pet. App., at A12-13.

In their arguments to this Court, Petitioners repeatedly proffer assertions on disputed issues as though they were adjudicated facts. The assertion that the more senior females also suffered "the most discrimination" (Petition, at 10) and therefore should have received relatively more under the decree is an allegation, not a fact; moreover, even if the factual bases of the allegation were established at trial, the amount and extent of recovery would still have been subject to the legal constraints imposed by the applicable statute of limitations. The contention that "the company itself deliberately and actively discouraged its female employees from accepting involuntary transfers" (Petition, at 18) is a hotly disputed contention, not a fact. To have refused to approve the settlement on the basis of such assertions would have required the district court to do what it is prohibited by applicable legal standards from doing, that is, to resolve disputed issues on the

merits. Rather than yielding to rhetoric and to the Petitioners' invitation to go beyond legally permissible bounds, the district court instead properly applied and weighed the appropriate factors in making its fairness determination.

C. The Court Of Appeals Applied The Proper Legal Standard In Upholding The Decree On Appeal.

The Seventh Circuit properly observed that "[t]he district court may not deny approval of a consent decree unless it is unfair, unreasonable, or inadequate." Pet. App., at A9. As to its own role, the appellate court stated that "[w]hile a district court should be chary of approving a consent decree, an appellate court's review of a decree is even more limited," citing *Armstrong v. Board of School Directors,* 616 8.2d at 315 and *Dawson v. Pastrick,* 600 F.2d 70, 75 (7th Cir. 1979). Pet. App., at A9-10. *Accord, Parker v. Anderson,* 667 F.2d at 1209. In accord with the appellate courts cited in its opinion (Pet. App., at A10), it then proceeded to apply an "abuse of discretion" standard of review. Finding no basis for concluding that the district court's careful analysis embodied an abuse of discretion, the court of appeals upheld the district court's approval of the settlement.

While the Petitioners stop short of alleging an actual abuse of discretion, they contend that the criteria for recovery in the consent decree are "arbitrary and capricious." Petition, at 17. But this contention ignores both the district court's careful weighing of the relevant factors and the objective bases for recovery set forth in the decree itself. Individuals selected for initial assignment relief were those females who were initially assigned to the Bottling Line Seniority Division and who demonstrated by their use of transfers to other seniority divisions during the period 1975-1981 that they might both have accepted an initial assignment to a seniority division other than the Bottling Line Division and successfully performed the work in another division. Those eligible for initial assignment relief were determined by a review of each female employee's work

history, and each individual employee was given a certain amount for each year of eligibility. This amount was determined by comparing the earnings of male and female employees with comparable seniority dates and by negotiations between the EEOC and Hiram Walker.

With regard to pension relief, Hiram Walker's position was that no individual was entitled to any relief, since full pension relief had been provided by the shutdown agreement between Hiram Walker and Local 55, negotiated at the time of the shutdown of Respondent's Peoria, Illinois, plant in 1981. That agreement provided that any employee, male or female, who had not earned a full year of pension credited service because of a layoff during any of the years from 1973 through 1981 would receive a full year of credited service for any such year. In Respondent's view, any relief prior to 1973 would have been time-barred by the two-year limitation on back pay liability set forth in Section 706(g) of Title VII, as amended, 42 U.S.C. § 2000e-5(g). By way of compromise, however, Hiram Walker and the EEOC agreed that those female employees hired prior to 1960 who tried to perform work in a seniority division other than the Bottling Line Division on at least one occasion would receive two (2) years of additional credited service for pension purposes, while female employees hired between 1960 and 1965 who tried to perform work in a seniority division other than the Bottling Line Division on at least one occasion would receive one (1) year of additional credited service. These additional pension credits were based, in each case, on estimates by the EEOC and Hiram Walker of the average differences in years of credited service between male and female employees of comparable plant seniority.

The application of these objective criteria produced an outcome in which, as the Seventh Circuit observed, "a substantial number of the affected women received significant relief. . . ." Pet. App., at A13. This fact, "when considered in light of the expense and great risks of further litigation," led the

court of appeals to conclude that the district court did not abuse its discretion." Pet. App., at A13.

This conclusion, the Seventh Circuit went on to observe, was not altered by the number of objectors. Noting that *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979) was the only case of which the court was aware in which the number of objectors was the key factor in reversing approval of a decree, the court noted that less than fifteen percent of the affected women objected to the decree in the instant case, as opposed to seventy percent in *Pettway*. Citing *Reed v. General Motors Corp.*, 703 F.2d 170 (5th Cir. 1983) and *TBK Partners, Ltd. v. Western Union Corp.*, 675 F.2d 456 (2d Cir. 1982), in which decrees were approved despite objections by forty percent and fifty-five percent, respectively, of affected claimants, the court was able to conclude without difficulty that the number of objectors in the instant case, in contrast to *Pettway*, was not sufficient to raise serious doubts as to the fairness of the decree. Because "no other factor is present in this case to suggest that the settlement is suspect, either in amount or in the procedural manner in which the parties reached, and the district court approved of, the settlement," (Pet. App., at A13), the Seventh Circuit found no reason to disturb its conclusion that the approval of the decree was within the sound discretion of the district court.

CONCLUSION

For the foregoing reasons, Respondent submits that no basis exists for granting the Petition For Writ Of Certiorari to the United States Court of Appeals for the Seventh Circuit. Not only do the Petitioners fail to cite any reason for granting the Writ of the character set forth in Supreme Court Rule 17, but the reasons that Petitioners do advance in contesting the careful application by the courts below of prevailing legal standards for

the review of a consent decree do not provide any basis for the exercise of this Court's power of supervision. Accordingly, the Respondent respectfully submits that the Petition be denied.

Respectfully submitted,

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Dated: June 6, 1986

APPENDIX

The following is a listing of parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates of respondent. This representation is made pursuant to Rule 28.1 of this Court.

Hiram Walker & Sons, Inc. has as its parent corporation Walker-Home Petroleum, Inc. Walker-Home Petroleum, Inc. is owned by Maidstone Essex Limited, which in turn is wholly owned by Hiram Walker-Gooderham & Worts Limited. Hiram Walker-Gooderham & Worts Limited is owned by Home Oil Company Limited and Walker-Home Oil, Ltd. Hiram Walker Resources Ltd. owns Home Oil Company Limited and Walker-Home Oil, Ltd. Gulf Canada Corporation, Olympia-York Enterprises Limited and Interprovincial Pipe Line Limited have substantial interests in Hiram Walker Resources Ltd. In addition, there is pending litigation in which Allied-Lyons P.L.C. is challenging the interests of Gulf Canada Corporation and Olympia-York Enterprises Limited and is seeking control of Hiram Walker-Gooderham & Worts Limited.

Supreme Court, U.S.
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No. 85-1587

In the Supreme Court of the United States

OCTOBER TERM, 1985

DELORES AGEE, ET AL., PETITIONERS

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the district court acted within its discretion in approving a consent decree settling a lawsuit brought by the Equal Employment Opportunity Commission pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, against an employer and a local chapter of a union.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 768 F.2d 884. The opinion of the district court (Pet. App. A17-A85) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1985 and rehearing was denied on October 8, 1985. The petition for a writ of certiorari was filed on January 6, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners contend that the courts below erred in approving a consent decree entered into between respondent Equal Employment Opportunity Commission (EEOC) and respondents Hiram Walker & Sons, Inc. (Hiram

Walker) and the Distillery Workers of America, Local 55 (Union).

1. In 1979, the EEOC filed a lawsuit pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, against Hiram Walker and the Union, alleging that they had engaged in unlawful sex-based discrimination against female employees at Hiram Walker's plant in Peoria, Illinois, which has been closed since late 1981 (Pet. App. A2, A3, A19). Based on EEOC's investigation of charges filed with the Commission in 1975 and 1977,[1] EEOC alleged that Hiram Walker unlawfully discriminated with respect to job assignment, promotion, transfer, layoff, and benefits, and that Hiram Walker and the Union had entered into collective bargaining agreements that perpetuated those discriminatory practices (*id.* at A19-A20). In particular, EEOC's lawsuit focused on discrimination against female employees who worked in Hiram Walker's all-female Bottling Line Division and who, for reasons disputed by the parties, Hiram Walker frequently laid off from employment. Because the time spent on layoff reduced their years of credited service for pension purposes, female employees received lower pension benefits than similarly situated males (*id.* at A4).

Following extensive pre-trial discovery, the EEOC, Hiram Walker, and the Union negotiated a consent decree, which, in September 1983, they filed with the district court for preliminary approval (Pet. App. A21). The proposed

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[1] In 1975, 123 individual women, the National Organization for Women, and the Union, filed charges with the EEOC alleging that Hiram Walker had unlawfully discriminated against female employees with regard to pension benefits (Pet. App. A2, A17-A18). In 1977, 113 individual women filed charges with the EEOC alleging that Hiram Walker and the Union had unlawfully discriminated against female employees with regard to job assignment, job exclusion, transfer, promotion, layoff, and certain benefits (*ibid.*).

consent decree (approved by the courts below) provides limited relief to female employees who were initially assigned to the Bottling Line Division and who demonstrated, by having transferred to other divisions during their careers, that they would have accepted an initial assignment in another division and would have performed successfully in that assignment (*id.* at A5, A32-A33). The decree provides pension relief to females hired before 1965 whose answers to questionnaires and work histories evidenced a willingness after 1965 to hold what was then considered a "man's job" (*id.* at A5, A33-A34).

The consent decree also provides for a total of $165,600.00 in direct monetary relief (Pet. App. A5, A34). The accrual date for this relief begins in 1975 (two years before the charges alleging discrimination in initial assignment were filed) and runs through 1981, the year the plant closed. The lump sum is based in part on the difference between the earnings of females who, according to specific guidelines developed by the parties, demonstrated a willingness to hold a "man's job" during the accrual period, and the earnings of males with comparable plant seniority (*id.* at A34-A35). The decree allocates the monetary relief, in varying amounts, to 82 females employees who, by their work history, demonstrated a willingness to hold a "man's job" through actual performance in such a job during the accrual period (*ibid.*; see *id.* at A102-A106). Charging parties who receive no other relief under the decree are entitled to share in any sums ultimately not allocated because the individual female employee entitled to the relief is deceased or cannot be found (*id.* at A108-A109).

2. The district court approved the consent decree as "fair" and "reasonable" after providing for notice to affected female employees, receiving written objections from some female employees, and conducting a public hearing at which the court heard arguments both in favor and in

opposition to the decree (Pet. App. A18, A21-22). The court specifically considered the claims of those objecting to the decree on the grounds (1) that the decree provided less relief to senior female employees, even though they would have suffered the most from the alleged discriminatory practices, and (2) that the decree failed to account for the fact that Hiram Walker actively discouraged female employees from transferring to a "man's job" (*id.* at A36-A43). The court stressed several factors in support of its decision to approve the decree, including that (1) there was a "real possibility that the litigation would continue for an extended period of time" (*id.* at A78-A79); (2) there were many "hotly contested" legal issues between EEOC, Hiram Walker, and the Union, which if "decided in favor of Hiram Walker, the end result would be no relief at all, or at least less relief than is contained in the Consent Decree" (*id.* at A80);[2] (3) the legal issues were not "well settled in [EEOC's] favor" (*ibid.*); (4) Title VII was not enacted until 1964 and, therefore, does not reach many of the claims of the more senior female employees (*id.* at A81); and (5) there would inevitably be some "arbitrariness" in any allocation formula fashioned (*id.* at A82). The court, however, granted leave to intervene for purposes of appeal to all charging parties who had filed objections to the decree and to all non-charging party objectors whose claims involved a question of law or fact common to the instant lawsuit (*id.* at A51-A76, A83-A84, A86-A87).

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[2]Among the legal issues disputed are whether (1) a 300-day state statute of limitations applies to the discrimination claims; (2) a two-year federal statute of limitations applicable to claims for back pay (see 42 U.S.C. 2000e-5(g)) was tolled by the 1975 filing of charges (instead of the 1977 filing); (3) the same federal limitations period applies to claims for pension relief; (4) Hiram Walker had a "bona fide" seniority system within the meaning of Title VII (see 42 U.S.C. 2000e-2(h)); and (5) Hiram Walker can defeat a discrimination claim merely by establishing that the complaining employee once turned down a transfer opportunity. See Pet. App. A43-A51; see also *id.* at A4-A5.

3. The court of appeals affirmed (Pet. App. A1-A15), concluding that the trial court had carefully considered petitioners' objections and did not abuse its discretion in approving the consent decree (*id.* at A10-A11). While noting petitioners' assertion that those who allegedly suffered the most discrimination over the longest period of time received less relief under the decree (*id.* at A6-A7), the court of appeals ruled that the trial court had "properly focused its analysis on a comparison of the settlement benefits * * * with the likely outcome of litigation" (*id.* at A10). The court stressed that none of the factors that might call for heightened scrutiny of the decree (*e.g.*, greater benefits to named plaintiffs, absence of extensive discovery) was present here; although many female employees who had been excluded from relief objected to the decree, none had "established that she should have been included" and "there was a substantial risk that no employees would have received any relief had the case gone to trial" (*id.* at A11-A13). Finally, the court rejected petitioners' contention that the settlement was inconsistent with the "remedial goal of Title VII to make whole the victims of sex discrimination" (*id.* at A14). According to the court, the "duty of a district court to make whole a victim of discrimination 'arises only after a judicial determination of discrimination' " and, therefore, does not apply in the context of a settlement (*ibid.*; quoting *United States* v. *Trucking Employers Inc.*, 561 F.2d 313, 317 n.13 (D.C. Cir. 1977)).

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of any other court of appeals, or of this Court, and presents no issue warranting this Court's review.

1. The petition for a writ of certiorari cites no decisions of any court of appeals and only incidentally cites one decision of this Court in support of its request for review

(Pet. 10, citing *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429-430 (1971)). Petitioners seek review essentially on the ground that the precise terms of the consent decree they challenge are, in their view, unfair and unreasonable in light of the particular circumstances of the case. Petitioners acknowledge that the standard of judicial review of a consent decree may have been limited in the courts below, but believe "that this Court of last resort is not so limited" (Pet. 23). Petitioners, however, misconceive the role of this Court, which is not simply to correct case-specific errors possibly committed by lower courts and which, in all events, is not to apply a stricter standard of judicial review than that of lower courts.

2. Petitioners' objections to the consent decree, moreover, lack any legal merit. Petitioners argue (Pet. 9-16) that the consent decree is inconsistent with the remedial purpose of Title VII to provide victims of sex discrimination with "make whole" remedies. As the court of appeals correctly concluded (Pet. App. A14), however, Title VII does not create a requirement that courts "make whole" persons who may or may not have been victims of discrimination. The essence of a settlement is compromise. See *United States* v. *Armour & Co.*, 402 U.S. 673, 681 (1971). And where, as here, there was a "substantial risk that no employees would have received any relief had the case gone to trial" (Pet. App. A13), the decision to settle is not inconsistent with Title VII, which, as petitioners acknowledge (Pet. 15), prefers voluntary resolution of disputes (see 42 U.S.C. 2000e-5(f)(1)).[3]

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[3]Petitioners erroneously claim (Pet. 12-13) that the EEOC defends the consent decree on the ground that Title VII's two-year statute of limitations applicable to back pay awards (see 42 U.S.C. 2000e-5(g)) limited their claims for pension relief. EEOC opposed that argument, made by Hiram Walker, as well as Hiram Walker's other defenses. See note 2, *supra*. The consent decree did not in any manner resolve those legal issues and reflects only the risks each respondent perceived it faced in proceeding to trial.

Petitioners also argue (Pet. 17-24) that the consent decree is unfair and unreasonable both because it provides less or no relief to those senior female employees who allegedly suffered more from discriminatory practices and because, by making an employee's prior acceptance of a transfer to a "man's job" a criterion for certain relief, the decree ignores the consideration that Hiram Walker actively discouraged female employees from accepting such transfers. Petitioners, however, fail to take into account the impact on settlement negotiations of the *legal* merits of the various claims at issue, including the strength of the various defenses advanced by Hiram Walker. See note 2, *supra*. One defense of particular concern was Hiram Walker's contention that applicable statutes of limitations barred many of the discrimination claims made by more senior employees. See Pet. App. A43-A44, A46-A51. Another such defense was Hiram Walker's argument that those female employees who had once declined an opportunity to take a "man's job" could not now establish that they had been victims of discrimination. See *id.* at A45-A46. Although the EEOC contested both these defenses, the defenses remained concerns that could not be ignored in settlement negotiations.

As the courts below recognized (Pet. App. A10, A80-A81), the reasonableness of a settlement agreement turns on the "likely outcome of the litigation" in the absence of settlement and not merely on the allegations of the parties. The terms of the consent decree, including the allocation of relief provided, reflect the respondents' assessments of the relative strengths and weaknesses of their legal arguments concerning the various claims of discrimination. There is no guarantee that those claims alleging the greatest discrimination will necessarily be those supported by the strongest legal arguments, particularly, where, as here, statutes of limitations could potentially have greater impact on more

senior employees' claims and problems of proof could disadvantage claims by individuals whose work history did not demonstrate as clearly as it might for others the impact of discrimination. The courts below correctly determined that the terms of the decree reflect the risks inherent in litigating these and other contested legal issues and that none of those employees excluded from relief under the consent decree had demonstrated a right to be included. Review of those rulings is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1986

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